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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

COMMONWEALTH OF KENTUCKY — Petitioner

versus

FRANK ELDRED — Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

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96 PP

QUESTION PRESENTED

THIS CASE PRESENTS THE QUESTION LEFT UNANSWERED IN PENNSYLVANIA V. RITCHIE, 480 U.S. 39 (1987): DOES A CRIMINAL DEFENDANT'S FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, CONFRONTATION OR COMPULSORY PROCESS OVERRIDE A STATE CREATED ABSOLUTE EVIDENTIARY PRIVILEGE?

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TO THE SUPREME COURT OF THE
COMMONWEALTH OF KENTUCKY

Comes now the Commonwealth of Kentucky, by and through its Attorney General, and respectfully petitions this Court for a writ of certiorari to review the judgment of the Supreme Court of Kentucky rendered September 21, 1995 in the above-styled case:

OPINION BELOW

The opinion of the Supreme Court of Kentucky is reported at Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1995), and is reprinted in the appendix hereto (Appendix, 2).

JURISDICTION

Following his conviction for murder in the state trial court, respondent appealed his conviction as a matter of right to the Supreme Court of Kentucky. The Supreme Court of Kentucky entered its initial judgment and opinion reversing the respondent's murder conviction on October 27, 1994.

Thereafter, the Commonwealth of Kentucky filed a Petition for Rehearing with the Supreme Court of Kentucky which was denied on September 21, 1995. However, on the Supreme Court of Kentucky's own motion that court modified its earlier opinion on September 21, 1995.

The jurisdiction of this Court to review the judgment of the Supreme Court of Kentucky is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> **Rights of accused.** In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides as follows:

> **Section 1. Citizenship; Due process; Equal protection.**
>
> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent's murder victim, Herbert Cannon, was incinerated in his automobile on July 23, 1988. Cannon's automobile was completely destroyed by an extremely hot fire which also incinerated his body. At trial, the Commonwealth demonstrated that the victim was killed by the respondent and a confederate, Tommy Perdue, at the request of the victim's ex-wife, Sue Melton, for the sum of $5,000. At the state court trial, the evidence established how Cannon was made comatose with the drug Halcion. After losing consciousness, the respondent placed Cannon in the back seat of his automobile and took the automobile to a location in Russell County, Kentucky. As Cannon began to regain consciousness, respondent injected a gram of cocaine into Cannon's arm with a syringe. Cannon's car was then set on fire by the respondent. A

subsequent autopsy of Cannon's corpse clinically described his cadaver as having suffered "extensive total body incineration."

The jury also heard that Cannon's ex-wife, Sue Melton, agreed to pay the respondent $5,000 for the killing of her ex-husband. Payment for this murder-for-hire was apparently on an installment basis as the jury heard that Melton made some 11 or 12 payments of $50 a month to a man named Tommy Perdue who was to pass the money along to the respondent. Additionally, the respondent received a Cadillac automobile as a down payment on the $5,000 Sue Melton owed him for the killing and incineration of Cannon.

The jury adjudged respondent guilty of murder and sentenced to life without the possibility of parole for 25 years on that conviction. He was also found guilty of first degree arson and was sentenced to life imprisonment on that conviction. Respondent then took an appeal, as a matter of right, to the Supreme Court of Kentucky.

On October 27, 1994, the Supreme Court of Kentucky rendered its initial judgment reversing and remanding the respondent's convictions. In its opinion the Supreme Court of Kentucky held that the respondent had the federal constitutional right pursuant to the Sixth and Fourteenth Amendments to discover the records relating to the psychiatric history of witnesses Sue Melton and Cynthia Moore.

On rehearing, the Commonwealth reminded the state high court that Kentucky law created an absolute evidentiary privilege which protects against disclosure of confidential communications uttered for the purpose of diagnosis or treatment of mental conditions. The Commonwealth, on rehearing, noted that the plurality opinion in Pennsylvania v. Ritchie, 480 U.S. 39 (1987) specifically left unanswered the issue of disclosure to a criminal defendant if the state provision prohibited "disclosure to anyone, including law-enforcement and judicial personnel." Ritchie, 480 U.S. at 57, n. 14.

On September 21, 1995, the Supreme Court of Kentucky declined the Commonwealth's invitation to grant a rehearing and modify its opinion concerning the discovery of the witnesses' psychiatric records (Appendix, 1). The court did, however, on its own motion modify its prior opinion relating to respondent's double jeopardy claims concerning his convictions for arson and murder (Appendix, 1).

Accordingly, the Commonwealth respectfully requests that this Court grant a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case which concluded that the Sixth and Fourteenth Amendments compel the disclosure of psychiatric records which are otherwise made absolutely privileged under Kentucky law.

REASONS FOR GRANTING THE WRIT

1.) This Court should review the judgment of the Supreme Court of Kentucky which concluded that the federal constitutional rights of a criminal defendant compel the disclosure of information

which is otherwise made absolutely privileged by state law. The Supreme Court of Kentucky wrongly relied on this Court's decisions in Pennsylvania v. Ritchie, 480 U.S. 39 (1987) and Davis v. Alaska, 415 U.S. 308 (1974) as authority for this proposition. The Supreme Court of Kentucky interpreted these cases too broadly and granted criminal defendants more than that to which they are entitled under the Federal Constitution.

Prior to the state court trial, defense counsel sought to obtain all records and reports relating to the psychological and psychiatric history of witnesses Sue Melton and Cynthia Moore. The Supreme Court of Kentucky held the state trial court committed reversible error when it declined to force the disclosure of the requested information. Relying on this Court's decisions in Ritchie and Davis the Supreme Court of Kentucky wrote "[i]t is clear that the government must produce evidence that is favorable to the accused and material to the question of his guilt and

punishment." [citation omitted] and that "[i]nformation that is thus disclosable will not necessarily be withheld because it is embarrassing to a witness for the prosecution." [citations omitted]. (Appendix, 21-22).

At footnote four of its opinion the Supreme Court of Kentucky specifically wrote that the source of such a right of disclosure for a criminal defendant is the due process clause of the Fourteenth Amendment. The Supreme Court of Kentucky also suggested that "a defendant's right to compulsory process to secure his witnesses for trial is broad enough to impact upon the government's obligation to provide discovery, . . ." and also noted that such a right may have foundations within the confrontation clauses of the Sixth and Fourteenth Amendments (Appendix, 23).

2.) Kentucky law has long recognized the privileged nature of communications made to physicians and other health professionals for the purposes of diagnosis or treatment of mental

conditions. At the time of the criminal proceedings against respondent in the state trial court, statutory privileges existed which protected against a forced disclosure of such communications (Appendix, 64-68). KRS 421.215(2) granted the patient of a psychiatrist the privilege to refuse to disclose or to prevent a witness from disclosing "communications relating to a diagnosis or treatment of the patient's mental condition between patient and psychiatrist . . . ." The statutory evidentiary privilege has been interpreted by the Supreme Court of Kentucky as absolute and has been placed "upon the same basis as that provided by the law between attorney and client." Matthews v. Commonwealth, Ky., 709 S.W.2d 414, 419 (1985). *See also*, KRS 319.111 (psychologist - patient privilege).

The same sort of absolute protection for such communications is now provided for under Kentucky law by Rule 507 of the Kentucky Rules of Evidence (KRE) which became effective January 1, 1992

(Appendix, 61). KRE 507 reaffirms an absolute privilege for psychotherapist - patient communications. Under the provisions of KRE 507(a)(2) a psychotherapist is defined as a physician, a licensed or certified psychologist, or a clinical social worker. The rule continues Kentucky's absolute policy against the disclosure of communications made for the purpose of diagnosis or treatment of mental conditions.

3.) The Supreme Court of Kentucky abrogated these absolute privileges by interpreting Davis and Ritchie too broadly. In Davis, the defendant sought to impeach the chief prosecution witness by cross-examining him about his previous juvenile criminal record. However, the trial court entered a protective order preventing him from pursuing any such questioning pursuant to an Alaska juvenile record protection statute which prohibited any reference to prior juvenile criminal adjudications during cross-examination. Davis, 415 U.S. at 312. The Court held that by not permitting the defendant

to probe the witness in regard to his former record in order to establish potential bias and motive, Alaska's protective statute denied him the opportunity to conduct effective cross-examination under the Sixth Amendment. Davis, 415 U.S. at 318-319. The Court's ruling in Davis only allowed the fact of the juvenile adjudications to be disclosed to the jury, "it does not require, nor should it be stretched to appear to require, disclosure of the private information found in a juvenile's case file." Camitsch v. Rigley, 705 F.2d 351, 354 (9th Cir. 1983). This conclusion is borne out by the plurality opinion in Ritchie, 480 U.S. at 54:

> The constitutional error in [Davis] was not that Alaska made this information confidential; it was that the defendant was denied "the right" to expose to the jury the facts from which jurors...could appropriately draw inferences relating to the reliability of the witness. (Citations omitted)

In Ritchie, the defendant claimed his Sixth Amendment confrontation rights were violated because he was denied access to confidential state welfare agency (CYS) records which purportedly

contained evidence exculpating him of charges that he sexually abused his minor daughter. In a plurality opinion, the Court rejected the contention that the Court's previous decision in Davis requires the statutory privilege of a witness to yield to the defendant's assertion of a need for protected information which might be used to impeach or otherwise undermine the testimony of a witness. Indeed, the plurality observed that if the Court were to accept such a broad interpretation of Davis "the effect would be to transform the confrontation clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view." Ritchie, 480 U.S. at 52.

The plurality in Ritchie did go on to hold that under the due process clause the defendant had the right to have the CYS file reviewed by the state trial court to determine whether it contained "information that probably would have changed the outcome of the trial.", Ritchie, 480 U.S. at 58.

The predicate for this conclusion was that "the Pennsylvania Legislature contemplated some use of CYS records in judicial proceedings." *Id.*

Significantly, the Court reserved decision as to whether the result would have been different if the statute had "protected the CYS files from disclosure to anyone, including law enforcement and judicial personnel." Ritchie, 480 U.S. at 57 n. 14 (emphasis original). This case presents the exact question left unanswered by the Court's decision in Ritchie. Review is warranted since the Supreme Court of Kentucky's answer to that question unnecessarily abrogates Kentucky's absolute privilege.

4.) The decision of the Supreme Court of Kentucky legally sanctions a fishing expedition by a criminal defendant into the psychotherapist-patient records of a witness under the guise of some federal constitutional right. In doing so, the decision simply ignores critically important societal interests. While the Supreme Court of Kentucky

apparently thought otherwise, the disclosure of psychiatric records is more than a temporary embarrassment. The very purpose of psychotherapy is to encourage complete, confidential and personal disclosure. It does not require a degree in psychology or psychiatry to recognize that one seeking counseling will hesitate to make complete disclosure if he or she even thinks that disclosure of those revelations may be ordered. *See*, 2 Weinstein's Evidence §504[03](1982).

Recognition of the importance of evidentiary privileges by the Court is long-standing. For instance, in United States v. Nixon, 418 U.S. 683, 709-710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) the Court set forth the following general rule:

> [t]he public . . . has a right to every man's evidence, except for those persons protected by a constitutional, common-law, or statutory privilege . . . the privileges referred to by the Court are designed to protect weighty and legitimate competing interests.

In Trammel v. United States, 445 U.S. 40, 51, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980), the Court

recognized that privileges such as those between priest and penitent, attorney and client, and physician and patient "are rooted in the imperative need for confidence and trust." In this vein, in In re Zuniga, 714 F.2d 632, 638 (6th Cir. 1983), cert. denied 464 U.S. 983 (1983), the Sixth Circuit explained the compelling reasons underlying the psychotherapist-patient privilege:

> Among physicians, the psychiatrist has a special need to maintain confidentiality. His capacity to help his patients is completely dependent upon their willingness and ability to talk freely. This makes it difficult if not impossible for him to function without being able to assure his patients of confidentiality and, indeed, privileged communication. Where there may be exceptions to this general rule . . . there is wide agreement that confidentiality is a *sine qua non* for successful psychiatric treatment. The relationship may be well likened to that of the priest-penitent or the lawyer-client. Psychiatrists not only explore the very depths of their patients' conscious, but their unconscious feelings and attitudes as well. Therapeutic effectiveness necessitates going beyond a patient's awareness and, in order to do this it must be possible to communicate freely. A threat to secrecy blocks successful treatment.

As recognized by this Court in Trammel, 445 U.S. at 48, the undeniably legitimate purposes underlying privileges "ought not to be casually cast aside." The Supreme Court of Kentucky's opinion in the instant case ignores this most important maxim.

5.) In holding that the state trial court was constitutionally required to conduct an in-camera hearing like the one ordered in Ritchie, the Supreme Court of Kentucky looked to Illinois v. Dace, 114 Ill.App.3d 908, 449 N.Ed.2d 1031 (1983) for "guidance." (Appendix, 25). The Supreme Court of Kentucky's reliance on Dace was mistaken given the absolute privilege of such communications under Kentucky law. In fact, Illinois caselaw **supports** Kentucky's contention that the psychiatric records in the present case are not discoverable by a criminal defendant.

Unlike KRE 507, the challenged statute in Dace did **not** contain an absolute privilege. *See*: The Mental Health and Developmental Disabilities Confidentiality Act, (Ill.Rev.Stat. 1981, ch. 91

1/2, par. 801.) Rather, it contained exceptions to the privilege and contained a specific provision for in-camera inspections of such records. In contrast, Kentucky law contains no such exceptions - much less an express provision providing for an in-camera inspection. Given the fundamental differences between the Illinois statute addressed in Dace and Kentucky law, the analysis of the Illinois decision in Dace was simply irrelevant.

In fact, when confronted with a statute similar to the Kentucky provisions, the Illinois courts have not hesitated to hold that a defendant's Sixth Amendment right to confrontation does not override an absolute statutory privilege. In People v. Foggy, 149 Ill.App.3d 599, 500 N.E.2d 1026 (1986), the defendant contended the privilege afforded confidential communications between rape victims and rape crisis counselors unconstitutionally impaired his Sixth and Fourteenth Amendment rights. The Illinois court rejected the defendant's claims because the statute contained an absolute privilege

containing no exceptions. *See*: Section 8-802.1 of the Illinois Civil Procedure Act(Ill.Rev.Stat.1985, ch. 110, par. 8-802.1). The Illinois court noted that the deletion of a section providing for an in-camera proceeding supported the conclusion that the information must be kept strictly confidential. Foggy, 500 N.E.2d at 1032. Thus, the Supreme Court of Kentucky should have relied on the analysis in Foggy because the statute in that case contained an absolute privilege similar to Kentucky law. Instead, the Supreme Court of Kentucky relied in part on an Illinois case interpreting a dissimilar statute to reach its overly broad reading of Davis and Ritchie.

The Supreme Court of Kentucky's interpretation of the affect of an absolute statutory privilege also runs afoul of Pennsylvania's holding in a case decided after this Court's decision in Ritchie. In Commonwealth v. Kyle, 533 A.2d 120 (Pa.Super. 1987), the Pennsylvania statute in question also contained an absolute statutory privilege

prohibiting the disclosure of communication between a patient and a psychologist. *See*: 42 Pa.C.S.A. §5944. In Kyle, the defendant maintained the failure to disclose contents of a psychologist's file on the victim denied him his Sixth Amendment Confrontation Clause rights. The Pennsylvania court reviewed the holding in Ritchie and noted the statute under attack in that case contained only a **qualified** statutory privilege while the statute under attack in Kyle contained an **absolute** statutory privilege. Kyle, 533 A.2d at 125. The Pennsylvania court thus determined that Ritchie permitted total non-disclosure when the statutory privilege was absolute. *Id.* The Pennsylvania court wrote that "[s]imply stated, an absolute privilege of this type and in these circumstances requires absolute confidentiality." Kyle, 533 A.2d at 131.

6.) Review is especially warranted since decisions among the states are by no means consistent in this area. As noted earlier herein,

Illinois and Pennsylvania courts have held that an absolute evidentiary privilege forecloses any disclosure of the communication in a criminal proceeding. In People v. District Court of Denver, 719 P.2d 722 (1986) the Colorado Supreme Court reached the same decision as the Illinois and Pennsylvania courts in holding that a criminal defendant was not entitled to examine the crime victim's psychotherapy records or to have the trial court review such records in-camera. However, other state courts have concluded that the statutory privilege must yield to the federal constitutional rights of a criminal defendant.

The Supreme Court of Connecticut in In re Robert H., 199 Conn. 693, 509 A.2d 475 (Conn. 1986) held that the absolute privilege embodied in a state statute violated the defendant's constitutional rights to confront the victim and cross-examine her about material in counseling records. Similarly, the Supreme Court of Rhode Island in Advisory Opinion to the House of

Representatives, 469 A.2d 1161, 1166 (R.I. 1983) advised the state legislature that a statutory proposal conferring an absolute confidentiality privilege to communications between a rape victim and a counselor, if enacted, would violate the state and federal constitutions. Likewise, other state courts have concluded that what would otherwise be absolutely privileged information under state law must yield to the purported federal constitutional rights of criminal defendants. *See*, Boho v. State, 256 Ga. 357, 349 S.E.2d 690 (1986); State v. McBride, 213 N.J.Super. 255, 517 A.2d 152 (1986). Because the various state courts are in conflict on this critical constitutional issue, guidance is needed from the Court. The question left unanswered in Ritchie should be answered by granting review of this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Supreme Court of Kentucky

91-SC-678-MR

FRANK ELDRED — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE PHILIP R. MORGAN, JUDGE
ACTION NOS. 90-CR-73, 90-CR-74,
90-CR-75, 90-CR-76

COMMONWEALTH OF KENTUCKY — APPELLEE

ORDER DENYING PETITION FOR REHEARING and MODIFYING OPINION

The petition for rehearing is hereby denied.

On the Court's own motion, the opinion of the Court rendered herein on October 27, 1994, is modified and the attached Opinion of the Court, and Opinion Concurring in Part and Dissenting in Part by Justice Stumbo, and Dissenting Opinion by Justice Wintersheimer are substituted in lieu thereof.

ENTERED: September 21, 1995.

/s/Robert F. Stephens
CHIEF JUSTICE

RENDERED: October 27, 1994
AS MODIFIED: September 21, 1995
TO BE PUBLISHED

Supreme Court of Kentucky

91-SC-678-MR

FRANK ELDRED — APPELLANT

V.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE PHILIP R. MORGAN, JUDGE
ACTION NOS. 90-CR-73, 90-CR-74,
90-CR-75, 90-CR-76

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION OF THE COURT BY JUSTICE STUMBO

REVERSING AND REMANDING

This appeal arises from the judgment of conviction of Appellant, Frank Eldred, for murder, for which he received a sentence of imprisonment for life without the possibility of parole for twenty-five years. He appeals to this Court as a matter of right.

On July 23, 1988, Herbert Cannon was killed when his automobile was burned. The automobile was completely destroyed by the extremely hot fire,

which also incinerated the body, although the official cause of death was smoke inhalation and carbon monoxide intoxication. The Commonwealth's theory of the case was that the decedent was killed by Appellant and a confederate, Tommy Perdue, at the request of Cannon's ex-wife, Sue Melton, for the sum of $5,000.

The Commonwealth's case was premised initially upon the testimony of Appellant's girlfriend, Cynthia Moore. She came forward in August 1990 and accused Appellant of the murder based upon statements he had made to her during the course of their relationship. There was additional evidence derived from the investigation of the crime, although it apparently was insufficient to make a case since no indictment was sought until after Moore came forward.

In any event, Appellant was arrested on November 15, 1990. An indictment was filed the next day charging Appellant, Melton, and Perdue, each with murder as a principal, complicity to

murder, first degree arson as a principal, and complicity to first degree arson. Since it was asserted that the murder was "for hire," and proper notice having been timely filed, the death penalty was a potential sentence. See KRS 532.025(2)(a)(4).

On December 7, 1990, a trial was scheduled to begin on June 10, 1991. Eventually, the trials of the three co-defendants were severed, and Appellant's was slated to go first. A pre-trial conference was held on Friday, May 31, 1991, at which time it appeared that the trial of Appellant would proceed, and further that neither of the other two co-defendant's would enter any plea agreement. Thereafter, on Wednesday, June 5, 1991, counsel and the trial court held a conference call concerning the status of the case. During the call, there was no mention of any potential plea agreements. At a subsequent hearing on various motions, including one to exclude all out-of-court statements by the co-defendants, on Friday, June

7, 1990, it was first revealed that the Commonwealth might reach an agreement with Melton, which would include her testifying for the Commonwealth at Appellant's trial. Although there was no motion by Appellant for a continuance at that time, the trial court raised the "specter" of a continuance based upon the serious impact such an agreement would have on Appellant's defense.[1]

In fact, a plea agreement was reached late on Friday, June 7. The essence of the agreement was that the charges against Melton would be amended to conspiracy to commit first-degree assault and conspiracy to commit kidnapping, which are both punishable as "Class C" felonies. The penalty recommended by the Commonwealth would be ten years on each offense to be served consecutively. She and her family were also to receive adequate protection from the police. In exchange, she

---

[1]The Commonwealth in its brief makes a pointed reference to this "failure," which seems overblown, at the least, since a motion for a continuance on June 7 would have been premature because there was no deal at that time.

agreed to truthfully testify at Appellant's trial. Her sentencing was to be postponed for sixty days in order to allow for the trial of Appellant to be concluded. The existence of the plea agreement was revealed on the morning of Monday, June 10, 1991, which had been scheduled to be the first day of trial. However, the Commonwealth was not initially prepared to disclose the substance of the plea agreement, the statement made by Melton in reaching the plea agreement, nor apparently any of the previous statements made by her. As a result, Appellant indicated he was not ready for trial, and a continuance was requested. The need for the continuance was based upon the failure to reveal the agreement and any of Melton's statements, as well as the need for additional investigation. Specifically, Appellant's counsel stated that he would now need to interview additional witnesses, whom he had not previously needed to consider in light of the severance of the trial of the co-defendants, and the anticipated order preventing

any statements from them being introduced; carefully consider the insurance policy issued on the life of the decedent, which might have been a motive for Melton to kill, as had been suggested by one of the investigating detectives; and follow up on any new leads revealed in this new information, and information which was to be disclosed concerning payments made by the police to, or on behalf, of Moore. In view of the sudden and dramatic change in circumstances, the need for new investigation, and because the Appellant was on trial for a capital offense, a continuance for sixty days was requested. The Commonwealth took the position that no continuance was necessary because it would take a week to seat the jury, which would allow for any needed investigation. The decision on the motion was postponed until the afternoon when Melton's counsel would be available.

At 1:00 p.m., Melton's counsel disclosed the substance of the plea agreement, which was outlined above. The Commonwealth disclosed that there was

no record of the statement made during the plea agreement by Melton either by the Commonwealth Attorney or by the investigating detective. Again, the Commonwealth was not prepared to release any statements made by Melton and proposed releasing them only on the morning of trial. After discussion between counsel and the trial court, which included a reiteration by Appellant's counsel of the grounds for continuance previously noted, as well as further explanation of the need for investigation based upon the vast difference between the statement Melton must have made during the plea agreement and her previous statements; the extensive file on Melton, who had been the subject of investigation, since the time of decedent's death; and the need to explore the psychiatric history of Melton, who had asked for a psychiatric examination shortly after her arrest. The trial court determined that a continuation of one week until Monday, June 17, 1991 was sufficient. It was further ordered that the Commonwealth would produce

the statement made by Melton as a part of the plea agreement by noon on Wednesday, June 12, 1991, as well as any other statements made by Melton.

On Friday, June 14, 1991, Appellant renewed his motion for a continuance of sixty days. In support of the motion, counsel restated the previous grounds, and pointed out that new lines of investigation developed as a result of the disclosure of Melton's statements. Specifically, questions had been raised about previous fires in which Melton had been involved and had collected insurance proceeds, which related to the allegation that Melton had killed to collect on decedent's life insurance policy, which would also provide a source of payment to Appellant and Perdue. Some investigation had been attempted on Thursday, June 13, 1991, which was the first day it could be attempted after delivery of Melton's statements on the afternoon of Wednesday, June 12, but was not completely successful, because one of the insurance agencies involved was closed. Additionally, there

were statements made by Melton to neighbors; an attempt to intimidate one of the neighbors, Wanda Carter, by Melton's boyfriend, Chuck Connors; questions concerning the time and dates of Melton's employment at Lake Lure Lodge; and questions about Melton's alibi witness, all of which needed further investigation. Appellant's counsel pointed out that all the needed investigation had to be accomplished during the remainder of Friday, and over the weekend, since trial was scheduled for Monday, June 17. The Commonwealth took the position that under Appellant's theory one would never be ready to try the case since there would always be other lines of investigation. Apparently, the trial court was persuaded because the motion was overruled.

The case proceeded to trial on Monday, June 17. After final pre-trial motions were considered, voir dire was commenced. Voir dire was conducted through Wednesday, June 19, when it was completed. The Commonwealth presented its case on June 19;

Thursday, June 20; Monday, June 24; and concluded on Tuesday, June 25, at which time Appellant presented his case. Instructions were argued on Wednesday, June 26. The guilt phase was concluded with instructions and closing arguments on Thursday, June 27, as was the penalty phase. Appellant was found guilty of murder and first-degree arson, and was sentenced to life without the possibility of parole for twenty-five years and life, respectively. Any additional facts necessary to our analysis will be set forth in the context of our discussion of the issues.

The first issue presented is whether the trial court abused its discretion in not granting Appellant's motion for a continuance of sixty days. A continuance will be granted upon a showing of sufficient cause. RCr 9.04; Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579, 581 (1991). The decision as to whether to grant a continuance is within the sound discretion of the trial court based upon the unique facts and circumstances of

the case. Snodgrass, 814 S.W.2d at 581. Factors that should be considered by the trial court include:

> (1) The length of delay;
>
> (2) Whether there have been any previous continuances;
>
> (3) The inconvenience to the litigants, witnesses, counsel, and the court;
>
> (4) Whether the delay is purposeful or caused by the accused;
>
> (5) The availability of competent counsel, if at issue;
>
> (6) The complexity of the case; and
>
> (7) Whether denying the continuance would lead to any identifiable prejudice.

Id. We also note that Appellant's case was a capital case, with the death penalty possible, which makes the case qualitatively different. See Smith v. Commonwealth, Ky., 845 S.W.2d 534 (1993).

As an initial note, there can be no dispute but that the plea agreement reached with Melton was a surprise, and had a sudden and dramatic impact upon Appellant's defense.

With that factor in mind, we will consider individually the factors noted in Snodgrass. The length of delay in this case was only sixty days, which is rather minimal, particularly in a death penalty case. Thus, the delay factor should not have seriously impacted the continuance decision.

Second, the continuance was the first sought by anyone, which distinguishes the result in Snodgrass, as well as most other death penalty cases, where numerous continuances are the rule rather than the exception. Nor are we persuaded by the Commonwealth's parade of horribles concerning the never ending need for further investigation since this was the first continuance sought, and any such problem can be properly considered when, and if, additional continuances are sought. Consequently, the previous-continuances factor

should not have come into play in the decision on Appellant's motion for continuance.

The third factor is the inconvenience caused by the continuance. Of course, any change in trial date is going to cause some inconvenience. Thus, in order to become a factor for consideration there must be some significant or substantial inconvenience, which should be demonstrated on the record. We note that in this case a continuance was granted, albeit only one week, which strongly suggests that the trial court was willing to put everyone to some inconvenience. As a result, it is difficult to see how a slightly longer period would have any significantly greater impact. While the reissuance of subpoenas could be an inconvenience, we note that the trial court has the power to put witnesses on recognizance to return on the newly scheduled trial date. In light of all the above, we must conclude that the

inconvenience factor does not weigh seriously against granting Appellant's motion for continuance in this instance.

There is no evidence in the record that the delay sought by Appellant was caused by him, or made for the purpose of delay in and of itself. In fact, the cause of the delay was the timing of the plea agreement with Melton. While it is not appropriate on this record to "blame" the Commonwealth, since there is no evidence as to why the deal with Melton was not made at an earlier time, it is fair to note that the Commonwealth is the one with the most control over such situations, and if it delays making a deal until the eve of trial, it runs the substantial risk that a continuance will be granted. Therefore, the cause of the delay factor cannot be held against Appellant, and may weigh in his favor.

The fifth factor[2] concerns the complexity of the case. This case was a death penalty case, which factor alone makes it more complex. Additionally, the charges were initially based upon the statements made by an informant, with numerous potential reliability problems, based upon statements allegedly made to her by Appellant and Perdue. Thus, numerous, and often difficult, hearsay and confrontation questions are presented. The complications are heightened, rather than lessened, by the last-minute introduction of a confessing co-defendant. As a result, the complexity factor should have weighed in favor of the continuance.

Finally, the last factor is whether there is identifiable prejudice caused by the denial of the motion. In this instance, there is no

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[2]There is no issue in this case concerning Appellant's counsel, or any potential substitute counsel, as would arise if there was an attempt to withdraw by counsel on the eve of trial as a result of a breakdown of communications between counsel and client.

question that Appellant's investigation was cut short. As we will note more fully later in the opinion, the avenues of investigation being pursued yielded relevant evidence, and might well have yielded additional, but as yet, undiscovered evidence if a full investigation had been possible. As such, there was clearly identifiable prejudice. It is no answer, as the Commonwealth attempts, to say that Appellant's counsel skillfully used the short time he had, and presented the best defense he could, since the question cannot be limited to what the defense is able to do despite the denial of its continuance motion, but whether legitimate, substantial avenues of investigation were prematurely cut off. In short, as Appellant argues in his brief, a defendant cannot be made subject to the "Catch 22" argument that he got enough investigation in the time available to obviate the need for a continuance, since such an argument begs the

question of whether a continuance was actually appropriate. In sum, there was identifiable prejudice which is not eliminated by the skill of Appellant's trial counsel.

Based upon our analysis of the relevant factors from Snodgrass, we conclude that the trial court abused its discretion in denying the motion for a sixty-day continuance. We particularly note the complexity of the case, the prejudice identified, and that the other factors should have had little, if any, impact on the continuance decision. As a result, we must reverse the conviction of Appellant and remand for a new trial after an appropriate period is allowed for further investigation by Appellant.

Appellant's second argument concerns his right to discover the medical and psychiatric records of Melton and Moore. This is an area where legitimate, substantial avenues of investigation were prematurely cut off. At

issue regarding Melton are records that may have been generated as a result of her request for psychotherapy shortly after her arrest in 1990, as well as other similar medical records, which would include her treatment from a Dr. Blose for emotional problems and "probably" depression. Additionally, her testimony disclosed that she was hospitalized for reasons unknown immediately after decedent's murder. Finally, she testified on avowal that she suffered from total amnesia from some time in the past, but could not remember the exact date. Moore's problems included admitted drug addiction, which along with her epilepsy and severe depression formed the basis for a social security disability claim. The epilepsy had been treated since her childhood with Dilantin. Apparently, she was under the care of a Dr. Bloce[3] and a Dr.

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[3]It is not clear from the record whether Drs. Bloce and Blose are one in the same person, or different physicians.

Garcia in reference to seizures resulting from her epilepsy. She had been hospitalized in Florence, Kentucky, in January 1989, and in Texas in June 1990. The Texas hospitalization also seems to be related to her seizures. She had attempted suicide in June 1990.

There does not appear to be any real dispute that Appellant is entitled to discover medical or psychiatric records concerning a witness if certain prerequisites are met. The fight is over what showing is required to gain such access. An important subsidiary question concerns how far the Commonwealth must go in furnishing such records, particularly where it does not have immediate, physical possession of them.

The Commonwealth relies primarily upon Commonwealth v. Huber, Ky., 711 S.W.2d 490 (1986), for its argument on the merits that there was no error in denying Appellant's discovery requests. It holds that the prior

mental treatment of a witness is relevant regarding the witness's credibility only where it can be shown that the witness suffered from a "mental deficiency," either at the time testimony was given or at the time at which the matter testified about occurred, and if the psychiatric problems relate to credibility. Id. at 491.

However, that holding is not as broad as the Commonwealth suggests. Huber involved a question of whether a trial court had abused its discretion by restricting a defendant's cross-examination at trial of the prosecution's key witness when the defendant had no substantial basis for the questions sought to be asked. In this case, the issue is actually one preliminary to that in Huber. Thus, Huber is not controlling.

It is clear that the government must produce evidence that is favorable to the accused and material to the question of his

guilt and punishment. Pennsylvania v. Ritchie, 480 U.S. 39, 107 S.Ct. 989, 94 L.Ed.2d 40, 57 (1987). Information that is thus disclosable will not necessarily be withheld because it is embarrassing to a witness for the prosecution. Id., 94 L.Ed.2d at 58; Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347, 356 (1974); see also Turner v. Commonwealth, Ky., 767 S.W.2d 557, 559 (1988), which held that the complaining witness can be compelled to submit to a medical examination where the critical nature of the evidence sought by the defendant outweighs the potential for harm caused by the resulting invasion of the victim's privacy, and the probability that the examination

sought was intended to harass the witness.[4] Information regarding the credibility of a prosecution witness has been recognized as the sort of exculpatory evidence which is subject to disclosure. Ritchie, 94 L.Ed.2d at 57 et seq.; Rolli v. Commonwealth, Ky.App., 678 S.W.2d 800, 802 (1984).

Before proceeding to analyze the specific procedure for such discovery, we must address

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[4]The source of this right is subject to some debate. It has been argued that a defendant's right to compulsory process to secure his witnesses for trial is broad enough to impact upon the government's obligation to provide discovery, although the question has been deliberately avoided. See Sixth and Fourteenth Amendments of the U.S. Constitution; Kentucky Constitution § 11; Ritchie, 94 L.Ed.2d at 56-57.

It has also been debated as to whether the right to cross-examination, included within the confrontation clause of the Sixth and Fourteenth Amendments and § 11, has an impact on questions of discovery. See Ritchie, 94 L.Ed.2d at 54 (Powell, J., writing for the Court, but with only Rehnquist, C.J., and O'Connor and White, JJ., concurring), in which the answer was no; Ritchie, 94 L.Ed.2d at 60-61 (Blackmun, J., concurring in part, and judgment, but writing separately on the issue), in which the answer was yes; and Ritchie, 94 L.Ed.2d at 63 et seq. (Brennan, J., dissenting, joined by Marshall, J.), in which the answer was also yes.

The actual constitutional source relied upon the in opinion for the Court in Ritchie was the due process clause of the Fourteenth Amendment to the U.S. Constitution. See Turner, 767 S.W.2d at 559, which was also decided on the basis of due process, although there was no delineation of whether the decision was based upon federal or state law.

the subsidiary question of the Commonwealth's obligation when the records sought are not in its immediate, physical control. The Commonwealth's obligation includes records actually in the hands of the prosecutor, its investigator, and other agencies of the state. Ritchie, 94 L.Ed.2d at 58; and Ballard v. Commonwealth, Ky., 743 S.W.2d 21, 22-23 (19898), which reversed a conviction after the Department for Human Resources withheld exculpatory evidence ordered to be produced, of which the Commonwealth's investigator was aware, although the Commonwealth's Attorney was not.

The Appellant's argument requires us to take the analysis as to both what is discoverable, and the Commonwealth's obligation to produce it one step further. Specifically, Appellant seeks access to the medical records of witnesses which may not be

in the hands of any government agent.[5] On this issue, we look to Illinois v. Dace, 449 N.E.2d 1031 (Ill.App. 1983) for guidance.[6] There, it was held if a trial court is "[confronted] with articulable evidence that raises a reasonable inquiry of a witness's mental health history, [the] court should permit a defendant to discover that history." Id. at 1035. Moreover, the articulable evidence required of the defendant does not have to establish the relevance and materiality of the records sought, which would be impossible without access to the records. Id. If necessary, the trial court should subpoena the records sought. Id. at 1034. However, the defendant is not entitled to

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[5]It is not clear on the record whether some of the medical records sought regarding Melton's examination after she was incarcerated are in the hands of some government agency. The other records appear to be in the hands of private physicians.

[6]Dace is based upon both the Sixth Amendment's right of confrontation and the Fourteenth Amendment's due process component. Dace, 449 N.E.2d at 1035.

unlimited access or use of the evidence sought. Instead, where the doctor or the patient raises the physician-patient privilege, or some other similar privacy interest is raised, an in-camera hearing shall be conducted by the trial court in the presence of the prosecutor and defense counsel to determine which information would be both relevant and material to the witness's credibility. Id. at 1035; see also Davis, 39 L.Ed.2d at 356; Ritchie, 94 L.Ed.2d at 58. A denial of effective cross-examination is a constitutional error of the first magnitude, and no showing of want of prejudice will cure it. Davis, 39 L.Ed.2d at 355.

As to the specifics of this case, we conclude that the trial court abused its discretion in denying the discovery sought. When considered together, the numerous problems that Moore had accumulate into articulable evidence that raises a reasonable

inquiry about Moore's past medical and psychiatric history sufficient to support Appellant's discovery request. Therefore, reversal is required. Upon remand, the trial court should direct subpoenas appropriately, and conduct any in-camera review necessary.

Regarding Melton, she made her mental state an issue by requesting psychiatric counseling. As such, Appellant has met his burden to support his discovery requests. Reversal follows, and the trial court should proceed accordingly upon remand.

Even if Melton's mental state was not such as to support discovery initially, upon the discovery of her "amnesia" an adequate basis for discovery of her medical and psychiatric records was created. See Ritchie, 94 L.Ed.2d at 59, which noted that the duty to disclose is ongoing, and that material originally deemed immaterial may become material as proceedings progress, and a trial court would

be obligated to order release of information that had become material.

Appellant also argues that the trial court should have held a competency hearing as to both Melton and Moore. See KRS 421.200, repealed Ky. Acts 1992, Ch. 324 § 33, see KRE 601. However, we need not decide the issue in view of our decision to reverse on other grounds, and remand for additional discovery. If upon remand sufficient additional evidence is adduced bearing upon the competency question, the trial court should reconsider the issue.

The third argument is that numerous instances of evidence of other bad acts were improperly used against Appellant. The question presented is whether the evidence should have been admitted in light of the general rule proscribing the admission of evidence of other, uncharged crimes or bad acts. See Billings v. Commonwealth, Ky., 843

S.W.2d 890, 892 (1992). Such evidence is admissible only if probative of an issue independent of character or criminal predisposition, and only where the probative value of, and need for, the evidence outweighs its unduly prejudicial effect. Id.; Sanders v. Commonwealth, Ky., 801 S.W.2d 665, 674 (1990). The traditional exceptions to the rule are where the evidence establishes motive, intent, guilty knowledge, identity, common plan or scheme, or absence of mistake or accident, Billings, 843 S.W.2d at 892. It has been said that the exceptions can be distilled down to the basic question of whether the evidence is relevant regarding one or more of the fundamental elements of a crime: corpus delicti, identity, or mens rea. Id.

The first, and most glaring, misuse of other crimes evidence occurred during the testimony of Moore. She was allowed, despite

a pre-trial motion in limine, to testify "[Appellant] said because if you're going to commit murder do it in Russell County because you will get away with it." The statement is said to be an admission of guilt. However, the statement does not contain a confession per se. Only by reading between the lines could it be said to be any confession. Instead, the statement appears to be more prospective -- "if you're going to"; therefore, more logically, it is a statement relating to future "acts" or intent. As a result, it is not relevant to the charges at issue, and it relates only to criminal character or predisposition, which precludes its admission. Id. Even if one were to assume the statement was a confession, when one considers the prejudicial impact against the probative worth of the statement, which is limited by its prospective language, and the need for the statement, which is limited given

the other instances in Moore's testimony where she testified in a much less inflammatory manner to instances in which Appellant "confessed," the statement still must be excluded. Id. Consequently, we must conclude that the trial court abused its discretion in admitting the statement. Since we are reversing on other grounds, we need not expressly decide if this error alone would amount to reversible error, although we do note the significant prejudicial impact the admission of this statement has on Appellant's defense.

A similar question was also subsequently asked of Moore by the Commonwealth. Although the issue is not preserved by contemporaneous objection, we will address it because it may arise on retrial. Specifically, the following exchange occurred between Moore and the Commonwealth's Attorney:

> Q. Cynthia Moore, look at the Jury and tell them if you knew about any other

murders that might have occurred in this section of the state, during the time you lived with Frank Eldred?

A. I have heard him talk about them, but I don't know any names, or anything like that, but yes.

Q. Were you acquainted with any other case, or any other murder down here besides the one you've testified about?

A. No.

This exchange is subject to the same analysis as the statement about committing murder in Russell County. The only reason it is addressed separately is because it shows a clear misunderstanding of the law concerning admission of other crimes evidence. The general rule is that such evidence is not admissible. Only where the evidence fits within one of the exceptions to the rule can it be considered for admission; it will be admitted only after a weighing process demonstrates the need for the evidence and the probative force of the evidence outweighs its admitted unduly prejudicial impact. This exchange does not even come close. Its admission was error.

The next issues on this subject we will consider generically. On several occasions Appellant was referred to as a biker, a drug dealer, a pimp, and as having made threats against Melton or Moore. Some of these instances are not preserved, but we will address them since they may arise upon retrial. As a general principle, the fact Appellant may have been a biker, a drug dealer, or a pimp has no relevance to this case, and it is difficult to find an exception under which such references could be admitted. They do not show Appellant's motive, intent, or guilty knowledge. Nor does identity appear to be an issue, which is one ground the Commonwealth advances on appeal for the admission of the biker references; thus, the evidence is not admissible under this exception. Finally, they do not relate to common plan or scheme, or absence of mistake or accident. Consequently, this type of evidence would appear to not be proper. However, it is difficult to judge these questions in the abstract, and the trial court should consider any

such evidence when the issue is presented consistent with this opinion.

As for the evidence of "threats," including generic statements made by the witnesses of their fear of Appellant, it is subject to a similar analysis. However, testimony as to actual threats made, as opposed to the more non-specific "fear" testimony, which appears more related to Appellant's character, may be admissible if it relates to the charges at issue in this case.

Finally, we note that the Commonwealth on appeal relies upon the "unsolicited" nature of the statements on several occasions in defending their admission. The "unsolicited" factor only bears upon a harmless error analysis, and cannot in any way justify the admission of other crimes evidence. Moreover, when the "unsolicited" defense appears enough times, an inference may be raised that either the witness or the Commonwealth is out of control, and is trying to abuse the system. While such is not necessarily established on this record,

instances of such abuse coupled with other areas of prosecutorial misconduct do raise the specter of reversible error, in and of themselves. See Sanborn v. Commonwealth, Ky., 754 S.W.2d 534 (1988).

Complaint is also made as to the introduction of certain photographs. Specifically, Appellant asserts that two photos of the interior of the victim's car after it was destroyed by the fire, which also indistinctly show the remains of the decedent, were irrelevant and inflammatory, and a proper foundation was not laid. We first note that the detective specifically testified as to each of the photos that they truly and accurately depicted the scene when the automobile was discovered, which supplies the necessary foundation. As for the other questions, the general rule is that relevant pictures are not inadmissible just because they are gruesome and the crime they depict is heinous. Clark v. Commonwealth, Ky., 833 S.W.2d 793, 794-95 (1992). The Commonwealth is allowed to depict the actual crime scene, which is what the photos at

issue do. See Id. While the photos are not the most distinct, they are not so indecipherable as to lose all relevance. Nor does the brutality of the crime they depict render them inadmissible. Cf. Id. Thus, there was no error in their admission.

Appellant also argues that a photo of the decedent taken a few months before his death was prejudicial since it unduly engendered sympathy for him. There is no error in presenting evidence of a victim as a living person, as opposed to a mere statistic, provided the evidence is not shocking, sensational, likely to provoke anger, or likely to induce undue sympathy or hostility. McQueen v. Commonwealth, Ky., 669 S.W.2d 519, 523 (1984). The photo in this case is a rather innocuous 8- by 11-inch portrait of the victim. It does not violate the rule from McQueen; therefore, there was no error in its admission.

The next error asserted concerns the admission of evidence seized and a statement made by Appellant during the course of his warrantless arrest on

November 15, 1990. A police officer may make a warrantless arrest when the officer has reasonable grounds to believe a felony has been committed, and that the arrested individual committed the felony. Crawford v. Commonwealth, Ky., 824 S.W.2d 847, 849 (1992). In other words, was there probable cause to make the arrest, which must exist and be known to the officer at the time of the arrest. See Clark v. Commonwealth, Ky.App., 868 S.W.2d 101, 106 (1993). Probable cause cannot be found in retrospect. Id. Probable cause exists when the totality of the evidence, which includes the reliability of an informant and her basis of knowledge, then known to the arresting officer creates a fair probability that the arrested person committed the felony. See Beemer v. Commonwealth, Ky., 665 S.W.2d 912, 913-15 (1984); Id. at 106-07.

In this case, the evidence available to the arresting officer was based primarily upon the statements of Moore concerning Appellant's "confession" to her. Additionally, there was some

corroboration of some of the details of her statement from evidence independently developed during the course of the investigation. However, it is equally true that some of the details from Moore were not corroborated by the investigation, and some were contradicted by the investigation. Moreover, there are substantial problems with Moore's reliability, which were noted in reference to the second argument presented by Appellant. Nonetheless; we must conclude from the totality of the evidence that the arresting officer had reasonable grounds to arrest Appellant for the murder of decedent. Consequently, the evidence seized from and the statements made by, Appellant were properly introduced.

Appellant's sixth assignment of error concerns the exclusion of certain evidence he desired to present to the jury. The first evidentiary ruling challenged concerns the admission of statements by a neighbor of Melton, Wanda Carter, that Melton's boyfriend, Chuck Connors, offered Carter money to

leave the state. He also threatened her in an effort to deter her from testifying that Melton had come to Carter and asked if she knew of anyone who would kill the decedent. The statements from Carter, and a denial that they were made by Connors, as well as the relationship between Connors and Melton, were made by avowal. This is another avenue of investigation which yielded relevant evidence, but which may have been prematurely cut short.

The basic issue is whether the evidence relates to a "collateral" matter. Impeachment by contradiction regarding collateral facts is prohibited. Lawson, The Kentucky Evidence Law Handbook (3d Ed. 1993) § 4.10. However, the intimidation of a witness by a defendant, or by her agent in this case, is admissible on the issue of guilt. Collier v. Commonwealth, Ky., 339 S.W.2d 167, 168 (1960). Moreover, Appellant has the right to introduce evidence that another person committed the offense with which he is charged, which would include the intimidation of Carter by Connors since

it is evidence of Melton's guilt in the murder of the decedent. Kelly v. Commonwealth, 259 Ky. 770, 773, 83 S.W.2d 489 (1935). As a result, the evidence offered concerning the intimidation of Carter was not collateral and should have been admitted. Since we are reversing on other grounds, we need not decide if this error alone would necessitate a reversal, although it is another example of the trial court's erroneous ruling denying Appellant the opportunity to present his defense. Upon retrial, if such evidence is offered it should be admitted.

The second evidentiary ruling with which Appellant takes issue is the exclusion of evidence that Melton lied on certain insurance forms. Specifically, evidence was offered by avowal that indicated that on an application for fire insurance for Melton's home that she had failed to advise the insurance company of other similar fire losses within three years of the application. As a result of that omission, her claim under the policy was

initially denied. Although ultimately she obtained a settlement. The evidence was said to be offered as impacting Melton's credibility since she had lied on the applications, as showing a pattern of conduct, and as reflecting on her motivation to kill the decedent.

The problem we have with this evidence is that it has wandered off into that nebulous realm of "collateral facts." See Lawson, § 4.10. While any lie by Melton does reflect on the likelihood she is telling the truth at trial, the "lies" on the insurance application are sufficiently remote from the real issues at trial to support the trial court's decision to exclude them. Id. Additionally, there is no true common plan or scheme between arson for profit and arson for murder under Billings, supra. Finally, as to motive, the evidence was at best cumulative, which would indicate its improper exclusion could not be reversible error. As a result, we conclude that the

trial court did not err in excluding the evidence regarding Melton's insurance application.

The seventh error argued is that Appellant's conviction of both murder and arson is a violation of double jeopardy. Specifically, it is argued that the two charges arose from the same course of conduct, which precludes conviction on both charges. See Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990).

The starting point for analysis of Appellant's double jeopardy claim must be Ingram v. Commonwealth, Ky., 801 S.W.2d 321 (1990).[7] The double jeopardy provision of Section Thirteen of the Kentucky Constitution provides that "[n]o person shall, for the same offense, be twice put in jeopardy of his life or limb . . . ." It bars

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[7]We are, of course, aware of the statutory scheme in KRS 505.020 et seq., which establishes a method of analyzing double jeopardy challenges for multiple offenses (KRS 505.020); former prosecutions for the same offense (KRS 505.030); former prosecutions for different offenses (KRS 505.040); and former prosecutions in other jurisdictions (KRS 505.050). However, in view of the plain language in Ingram, which held that "[t]his Court holds the Kentucky Constitution superordinate to legislative intent," Ingram is the proper source for double jeopardy analysis. Ingram, 801 S.W.2d at 323.

subsequent prosecution for an offense once a defendant is acquitted or convicted, and it also prohibits multiple punishment for the same offence. Ingram, 801 S.W.2d at 322.

The constitutional proscription against double jeopardy in Kentucky begins with consideration of the venerable precedent of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The test derived therefrom is that where an act or transaction constitutes a violation of two distinct statutes, a defendant can be prosecuted for both if each statute requires proof of a fact the other does not.[8] Ingram, 801 S.W.2d at 322, quoting Blockburger, 284 U.S. at 304. In other words, is one offense included within another. Ingram, 801 S.W.2d at 322.

The next step in the consideration of a double jeopardy challenge is the second prong enunciated in Ingram. It prohibits multiple prosecutions where

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[8]The provisions of KRS 505.020-.050 appear to be an attempt to codify Blockburger. Ingram, 801 S.W.2d at 322.

the offense(s) arose from a single act or impulse with no compound consequences, even though "[b]y virtue of additional, circumstantial facts, the behavior was offensive to two criminal statutes." Id. at 324-25.[9]

Under the Blockburger prong of Ingram, we readily conclude that there was no double jeopardy violation occasioned by the conviction of Appellant for murder and arson. The murder charge requires proof of decedent's death, which is not required in proving arson. On the other hand, arson requires only proof of serious physical injury. Additionally, the arson charge requires proof of intent to damage or destroy the automobile, which is not an issue in the murder charge. Thus, there are distinct elements in each of the offenses not

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[9]We note that the issue is not Grady, 109 L.Ed.2d 548, which was recently overruled in United States v. Dixon, 509 U.S. __, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). Although this Court in Ingram quoted the "same conduct" test enunciated in Grady, it did not adopt it. Ingram, 801 S.W.2d at 323. Moreover, the "single act or impulse" test of Ingram would appear to be narrower than the same conduct test.

required for the other, which precludes a finding of double jeopardy under the first prong of Ingram.

Neither does the second prong in Ingram preclude appellant's conviction for both murder and arson. While double jeopardy principles prohibit multiple prosecutions for crimes which arise from only a single act or impulse, an exception is made when that act produces compound consequences. The results achieved by appellant's criminal conduct produced compound consequences arising from his single act of burning the automobile with the victim inside Setting the car afire had the compound consequences of killing the occupant and destroying the car, the former being murder and the latter being arson. The conviction of appellant for both crimes was proper.

The next argument concerns the Commonwealth's closing argument in the guilt phase. Although it will belabor an already overlong opinion, we will quote at length from the offending portions of the closing argument.

> Herbert Cannon has been dead for over 1,000 days and nights. The Defendant, and indeed you and I, and all of us in this courtroom, have had those days and nights. I'm sure Herbert would have liked to have had those days and nights. If, in the future, one should say a prayer, say one for Herbert. If, in the future, one should light a candle, light one for Herbert. If, in the future, someone should cry a tear, cry one for Herbert. I ask nothing for my ownself. I ask nothing for the State Police. I ask nothing in the name of persecution. I ask nothing that is wrong. But, not--I ask for everything in the name of what is right, and in the name of what is just. That's why we're here. We ask for everything in the name of truth. In the third chapter of Ecclesiastes it says, "There is a time for everything under the heavens, a time to be born, and a time to die." Surely God did not intend on the 23rd day of July, 1988, that Herbert Cannon dies. Surely the cold, callous words of the Defendant as to why the killing took place in Russell County, to the effect that you can get away with murder in Russell County, is not true. Say a thousand times if it takes it that you cannot get away with murder in Russell County. Return a verdict of guilty. Herbert Cannon cries from the grave for what is just and right. From his poor, dismantled, and burned body, he asks, through me, return a verdict of guilty.

Specifically, error is asserted concerning the prosecutor's quotation from Ecclesiastes, and then arguing that the decedent had been killed before God intended him to be. Appellant suggests that

this argument is essentially the same as the argument that was condemned in Ice v. Commonwealth, Ky., 667 S.W.2d 671, 676 (1984). Disregarding the distinction that the argument in Ice was made during the penalty phase while the argument in this case was made in the guilt phase, which is a distinction without any real difference, the situation is distinguishable. In this instance, the argument was not made, as it was in Ice, that The Bible or God required a conviction. Instead the reference was more in the way of a literary reference. In that vein, we note for what it is worth that the same quotation could have been made from several other sources which quote The Bible, including Shakespeare, Dickens, the musical "Hair," and The Byrds' song "Turn, Turn, Turn," although perhaps not with the same persuasiveness. Thus, we find no reversible error. However, we do note the prejudicial impact under this argument of the erroneous admission of Appellant's Russell County comment analyzed above.

Further attack is made upon the closing argument asserting that the prosecutor improperly attempted to elicit sympathy for the decedent. Although the question presented is not without its difficulties, considering the leeway a prosecutor is allowed in arguing his case, we cannot say the attempt to elicit sympathy rose to the level of reversible error. See Smith v. Commonwealth, Ky., 734 S.W.2d 437, 448, 452 (1987).

However, we do think it appropriate to further note that prosecutors have "the responsibility to [prosecute] according to the principle that one accused of a crime is entitled to a fair and impartial trial." Clark, 833 S.W.2d at 797. That responsibility is abused when they make arguments that appear calculated to skate as close as possible to the edge of arguments previously condemned by this Court. Such gamesmanship does not do justice, and always flirts with a fall through thin ice into the icy waters of reversal for prosecutorial misconduct. Both portions of the

argument at issue in this case appear to have been based upon such a calculation. However, in this instance we need only condemn the arguments and warn against repeated reliance upon them, or any similarly calculated argument.

It is also argued that Appellant was entitled to a directed verdict on the issue of the aggravating factor of "murder for hire." It is said that the only evidence on the subject is the uncorroborated testimony of Moore, who is completely unreliable. The standard for a directed verdict is as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). An appellate court reviewing the issue

must determine whether it would have been clearly unreasonable for a jury to find a defendant guilty, and otherwise uphold the jury's verdict. Id. While there may be a case where a witness's testimony is so incredulous, self-contradictory, or otherwise unreliable that the testimony could not support a conviction, Moore's testimony is not so deficient. It was up to the jury to determine how "unreliable" her testimony was. We further note that Melton testified that she had hired Appellant to murder the decedent. Therefore, it was not clearly unreasonable for the jury to find Appellant guilty. As a result, there was no error in overruling Appellant's motion for a directed verdict.

The last separate argument was raised by way of a supplemental brief. It is based upon the conduct of an Assistant Commonwealth's Attorney during Appellant's closing argument. Specifically, as stated by the trial court:

> I want to state for the record that at least 3 or 4 times during the Closing

> Argument of [Appellant's trial counsel] the attention of myself, the Court, was drawn to the table in which the Commonwealth Attorneys were seated by noise. And that noise was made by the Assistant Commonwealth Attorney . . . . Upon observing the Commonwealth table I personally observed [him] smiling, and making expressions of what I would interpret to be disbelief directed toward [his colleagues]. The importance of this is, the Jury in this courtroom in Russell County is seated in such a way so as to directly face the prosecutor's table. I didn't stop [Appellant's trial counsel's] closing statement, but I don't want that kind of thing to go on. It shouldn't have happened. The proceeding should not be affected by jestures [sic]. And it's common rules of courtesy to the Court, and opposing counsel, and to the Jury as well as the integrity of the proceedings, demand a higher level of conduct, and I don't appreciate it.

The following motion for a mistrial was overruled. We also note the offending party's childish "he did it too" comment. Although we find no reversible error, our comments following our discussion of the Commonwealth's closing argument are applicable here too. In fact, such conduct unremoved from the heat of closing argument is even more condemnable; it cannot be tolerated.

Appellant's cumulative error argument is rendered moot by our decision to reverse and remand.

For the reasons set forth above, we reverse the convictions of Appellant for murder and arson and remand for further proceedings consistent with this opinion.

Stephens, C.J., Leibson, and Reynolds, JJ., concur. Stumbo, J., concurs in part, but dissents by separate opinion in regard to the double jeopardy issue. Wintersheimer, J., dissents and files a separate opinion herewith, in which Fuqua, J., joins. Lambert, J., concurs in the majority opinion's treatment of the double jeopardy issue, and dissents without separate opinion as to reversal of the conviction.

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RENDERED: October 27, 1994
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Supreme Court of Kentucky

91-SC-678-MR

FRANK ELDRED APPELLANT

v. APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE PHILIP R. MORGAN, JUDGE
ACTION NOS. 90-CR-73, 90-CR-74,
90-CR-75, 90-CR-76

COMMONWEALTH OF KENTUCKY APPELLEE

CONCURRING IN PART AND DISSENTING IN PART
BY JUSTICE STUMBO

Respectfully, I must dissent from the majority's conclusion that the conviction of Appellant for both murder and arson was proper pursuant to the second prong in Ingram v. Commonwealth, Ky., 801 S.W.2d 321 (1990).

The second prong in Ingram yields a different result than expressed by the majority. In this case, the act of burning the car (i.e., arson) is part and parcel of the murder, which was the intended result. In other words, the arson was but

the instrumentality to accomplish the murder. As such, it is the product of the same act or impulse. Nor is this a case where there are "compound consequences." Although the phrase "compound consequences" is laden with considerable ambiguity, the typical application would be where someone fired an automatic weapon into a crowd intending to kill only one person, but ended up killing several people. In that instance, the killer could properly be charged with multiple murders, even though they were the product of only "one act or impulse." By contrast, in this case the result of burning the car was to kill the decedent; there were no additional consequences or repercussions as a result of the burning of the car itself. Therefore, the conviction of Appellant for both murder and arson in this case was a violation of the proscription against double jeopardy in Section Thirteen of the Kentucky Constitution.

With all other issues, I concur.

RENDERED: October 27, 1994
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Supreme Court of Kentucky

91-SC-678-MR

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APPEAL FROM RUSSELL CIRCUIT COURT
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90-CR-75, 90-CR-76

COMMONWEALTH OF KENTUCKY — APPELLEE

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from the majority opinion because none of the alleged errors cited are of sufficient importance to require reversal.

Eldred failed to demonstrate that the trial judge abused his sound discretion when he refused to continue the trial for an additional sixty days. The trial judge did postpone the trial for one week to permit any additional investigation by defense counsel. Eldred has failed to show how the refusal of the trial judge to further delay the trial

prejudiced the defendant's ability to defend himsel against the charges. Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case, and th decision to delay a trial rests solely within the sound discretion of the trial judge. RCr 9.04; Snodgrass v. Commonwealth, Ky., 814 S.W.2d 579 (1991). The detailed review of the decision of the trial judge in this regard made by the majority opinion does not convince me that there is any erro such as would be condemned by Snodgrass, supra. A review of the record indicates that the trial judge exercised his discretion properly in determining whether to allow a delay and considered the length of the delay, previous continuances, inconvenience to litigants and the court, whether the delay is purposeful or caused by the accused, the complexity of the case and whether denying the continuance would lead to identifiable prejudice. There is no basis to reverse the conviction in this case.

The trial judge properly excluded evidence of the general mental condition of Moore and Melton because there was no demonstration by the defendant that any psychiatric problems could be related to their credibility. I do not believe that any avenue of investigation was prematurely terminated by the trial judge.

Commonwealth v. Huber, Ky., 711 S.W.2d 490 (1986), states in pertinent part as follows:

> The prior mental treatment of a witness is not relevant as to the credibility of that witness unless it can be demonstrated that there was a mental deficiency on the part of the witness, either at the time of the testimony or at the time of the matter being testified about. The mere fact that a particular witness has been treated for any kind of psychiatric problem in the past is of no significance in the impeachment of that witness unless it can be shown that the psychiatric problems relate in some way to the credibility of the witness.

The standard of Huber, supra, was not satisfied in regard to the general mental condition of either of the two witnesses. Thus the evidence was properly excluded. Cf. Stanford v. Commonwealth, Ky., 793 S.W.2d 112 (1990). The trial judge did

not abuse his discretion in denying the discovery sought.

Eldred has failed to demonstrate that there was any improper introduction into evidence of prior bad acts or character evidence which would require a reversal. None of the complained of statements during the trial deprived Eldred of a fundamentally fair trial. The statements which are alleged as error are either unpreserved, were relevant for the jury to hear or were otherwise introduced into the proceedings as a result of the trial strategy of the defendant.

I agree with the majority that there is no double jeopardy in this case because murder and first-degree arson require proof of an element the other does not. However, the double jeopardy analysis in Ingram v. Commonwealth, Ky., 801 S.W.2d 321 (1990), is still fatally flawed because it relies on Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed. 2d 548 (1990), which has been subsequently overruled in United States v. Dixon,

509 U.S. ___, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). This has been duly noted by the majority opinion. It is time to put Ingram to rest by overruling it. The same fate should fall to Walden v. Commonwealth, Ky., 805 S.W.2d 102 (1991). I believe Kentucky should return to the reasoning of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and the standard set out in Wilson v. Commonwealth, Ky., 695 S.W.2d 854 (1985) and Polk v. Commonwealth, Ky., 679 S.W.2d 231 (1984). See my dissent in Ingram.

I would affirm the conviction in all respects.

Fuqua, J., joins in this dissent.

KRE 507. PSYCHOTHERAPIST-PATIENT PRIVILEGE

(a) Definitions. As used in this rule:

(1) A "patient" is a person who, for the purpose of securing diagnosis or treatment of his or her mental condition, consults a psychotherapist.

(2) A "psychotherapist" is:

(A) A person licensed by the state of Kentucky, or by the laws of another state, to practice medicine, or reasonably believed by the patient to be licensed to practice medicine, while engaged in the diagnosis or treatment of a mental condition;

(B) A person licensed or certified by the state of Kentucky, or by the laws of another state, as a psychologist, or a person reasonably believed by the patient to be a licensed or certified psychologist;

(C) A clinical social worker, licensed by the State Board of Examiners of Social Work and holding a certificate of qualification for the independent practice of clinical social work; or

(D) A person licensed as a registered nurse or advanced registered nurse practitioner by the board of nursing and who practices psychiatric or mental health nursing.

(3) A communication is "confidential" if not intended to be disclosed to third persons other than those present to further the interest of the patient in the consultation, examination, or interview, or persons reasonably necessary for the transmission of the communication, or persons who are present during the communication at the

direction of the psychotherapist, including members of the patient's family.

(4) "Authorized representative" means a person empowered by the patient to assert the privilege granted by this rule and, until given permission by the patient to make disclosure, any person whose communications are made privileged by this rule.

(b) General Rule of Privilege. A patient, or the patient's authorized representative, has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purpose of diagnosis or treatment of the patient's mental condition, between the patient, the patient's psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient's family.

(c) Exceptions. There is no privilege under this rule for any relevant communications under this rule:

(1) In proceedings to hospitalize the patient for mental illness, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization;

(2) If a judge finds that a patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of an examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental condition; or

(3) If the patient is asserting that patient's mental condition as an element of a claim or defense, or, after the patient's death in any

proceeding in which any party relies upon the condition as an element of a claim or defense.

[Adopted effective July 1, 1992; amended by Acts 1994, c.367, § 13, effective July 15, 1994.]

KRS 421.215. Psychiatrist-patient privilege - Limitations. [For effective date of repeal of this section see Compiler's Notes.] (1) As used in this section, unless the content requires otherwise:

(a) "Patient" means a person who, for the purpose of securing diagnosis or treatment of his mental condition consults a psychiatrist;

(b) "Psychiatrist" means a person licensed to practice medicine who devotes a substantial portion of his time to the practice of psychiatry, or a person reasonably believed by the patient to be so qualified;

(c) "Authorized representative" means a person empowered by the patient to assert the privilege granted by this section and, until given permission by the patient to make disclosure, any person whose communications are made privileged by this section.

(2) Except as hereinafter provided, in civil and criminal cases, in proceedings preliminary thereto, and in legislative and administrative proceedings, a patient, or his authorized representative, has a privilege to refuse to disclose, and to prevent a witness from disclosing, communications relating to diagnosis or treatment of the patient's mental condition between patient and psychiatrist, or between members of the patient's family and the psychiatrist, or between any of the foregoing and such persons who participate, under the supervision of the psychiatrist, in the accomplishment of the objectives of diagnosis or treatment.

(3) There shall be no privilege for any relevant communications under this section:

(a) When a psychiatrist, in the course of diagnosis or treatment of the patient, determines that the patient is in need of admission to or

commitment to a hospital for care of the patient's mental illness;

(b) If a judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychiatrist in the course of a psychiatric examination ordered by the court provided that such communications shall be admissible only on issues involving the patient's mental condition;

(c) In a civil proceeding in which the patient introduces his mental condition as an element of his claim or defense, or, after the patient's death, when said condition is introduced by any party claiming or defending through or as a beneficiary of the patient, and the judge finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between patient and psychiatrist be protected. (Enact. Acts 1966, ch. 121, §§ 1 to 3.)

KRS 319.111. Communications privileged. - The confidential relations and communications between licensed psychologists or certificate holders and their clients are placed upon the same basis as those provided by the law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed. (Enact. Act. 1964, ch. 154, § 13; 1986, ch. 128, § 15, effective July 15, 1986.)

EDITOR'S NOTE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF KENTUCKY, PETITIONER,

v.

FRANK ELDRED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1995

COMMONWEALTH OF KENTUCKY, PETITIONER,

V.

FRANK ELDRED, RESPONDENT.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, Frank Eldred, asks leave to file the attached Respondent's Brief in Opposition to the Commonwealth of Kentucky's Petition for Writ of Certiorari to the Supreme Court of Kentucky, without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.

Respondent has been permitted by the Kentucky courts to proceed as an indigent at all stages of this action. Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

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NO. 95-1018

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF KENTUCKY, PETITIONER,

V.

FRANK ELDRED, RESPONDENT.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, Frank Eldred, being first duly sworn according to law, depose and say that I am the respondent in the above-captioned case, that in support of my motion to proceed in forma pauperis without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; and that, for the reasons stated in my petition for writ of certiorari, I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes (√) No ( )

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.
   approximately 20.00 per month state prison pay

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes ( ) No (√)

   a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts? Yes ( ) No (√)

   a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes (√) No ( )

   a. If the answer is yes, describe the property and state its approximate value.
   2 acres in Brenda, Az - Approximately 500.00
   65 Ford truck - Approximately 1000.00

5. List the persons who are dependent upon you for your support and state your relationship to those persons.
   None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Frank Eldred
FRANK ELDRED

Subscribed and sworn to before me by Frank Eldred on this 23rd day of January, 1995.

Linda Burkholder
NOTARY PUBLIC, STATE AT LARGE

My Commission Expires: 3-24-1999

QUESTION PRESENTED

WHETHER THIS COURT LACKS JURISDICTION TO REVIEW ELDRED V. COMMONWEALTH, KY., 906 S.W.2d 694 (1995), BECAUSE THE QUESTION WAS NOT PROPERLY RAISED BELOW, AND BECAUSE THE DECISION OF THE KENTUCKY SUPREME COURT CORRECTLY APPLIED THE EXISTING LAW WHEN IT FOUND THAT ELDRED WAS DENIED DUE PROCESS AND HIS RIGHT TO CONFRONTATION BY THE FAILURE OF THE TRIAL COURT TO GRANT RESPONDENT'S MOTION FOR DISCOVERY AND EXAMINATION REGARDING THE MEDICAL/MENTAL HEALTH RECORDS OF TWO KEY WITNESSES.

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NO. 95-1018

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF KENTUCKY, PETITIONER,

V.

FRANK ELDRED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Frank Eldred, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of Kentucky in this case.

OPINION BELOW

The opinion of the Supreme Court of Kentucky is reported as Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1995), and is attached as part of respondent's appendix (Appendix, hereinafter A 1-17).

JURISDICTION

Respondent contests petitioner's assertion that this Court has jurisdiction over petitioner's petition under 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Section Two of the Kentucky Constitution provides:

> Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

Section Seven of the Kentucky Constitution provides:

> The ancient mode of trial by jury shall be held sacred, and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

Section Eleven of the Kentucky Constitution provides, in pertinent part:

> In all criminal prosecutions the accused has the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor. He can not be compelled to give evidence against himself, nor can he be deprived of his life, liberty or property, unless by judgment of his peers or the law of the land....

KENTUCKY RULES OF CRIMINAL PROCEDURE

RCr 9.22 provides:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefor; and, if

> a party has no opportunity to object to a ruling or order at the time that it is made, the absence of an objection does not thereafter prejudice him.

COUNTERSTATEMENT OF THE CASE

There was no eyewitness to the death of Herbert Cannon which occurred in Russell County Kentucky, on July 23, 1988. Over two years later, on August 8, 1990, the respondent's girlfriend, Cynthia Moore, contacted the police to accuse respondent Eldred of criminal acts involving drugs and a gun. She admitted she did this because she had disagreements with Eldred and she sought to obtain his arrest in order to get him away from her. When her first accusations did not result in Eldred's arrest, Moore told the police that Eldred had told her that he killed the ex-husband of Sue Melton. Moore admitted that at the time of the alleged confession by Eldred to her, she was under the influence of drugs and did not believe the story. According to Moore's story, Melton was supposed to pay Eldred for killing Cannon. Eldred was supposed to have put "halcion" in Cannon's drink, and placed him in the back seat of a car. He supposedly had Cannon taken to a place near Melton's employment at a state park. Cannon allegedly woke up and Eldred shot a gram of cocaine into Cannon's arm. Eldred allegedly confessed to having placed a bag of chlorine in the gas tank and thereby setting the car on fire. However, the testimony from the state arson expert established that the gas tank was in tact, that there was no burn pattern in the gasoline lines, but that there was an accelerant which had been placed at Cannon's feet in the back

floorboard of the car. Photographs of the car confirmed that the gas tank was in tact.

Melton, respondent and two others were charged as a principal or accomplice to the murder of Cannon and arson. As a last minute move, Sue Melton entered into a plea agreement with the prosecution, and the trial court denied Eldred a continuance to conduct further investigation into Sue's history of setting fires to collect insurance proceeds, inter alia. The Kentucky Supreme Court reversed Eldred's conviction due to the trial court's abuse of discretion in denying the continuance motion. Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 700 (1995).

On February 1, 1991, a Request for Disclosure and Production of Exculpatory Evidence was filed which sought "[a]ny and all reports and records on the mental health, drug dependency...of the informant." At a pretrial hearing, the motion to bar the testimony of Melton and Moore was addressed.

Sue Melton's Mental Condition

Defense counsel noted that Melton's attorney made a motion for her to receive extensive psychotherapy at the Adair County Jail. This was accompanied by an affidavit from a Mrs. Brooks, who stated that she had observed Melton, and she recommended that Melton receive extensive psychotherapy and psychiatric and medical care and attention. A request for Melton's mental health records was made. Defense counsel was aware that Melton had been seen by a Dr. Blose for emotional problems and probably depression. The trial court reserved ruling until Melton

testified. The Commonwealth did not oppose the motion, but merely indicated it did not have any records. This was a tacit indication that the Commonwealth recognized that there is no absolute statutory privilege which would prevent disclosure of the information. The Commonwealth thereby waived any argument it had to the effect that there is an absolute statutory privilege. Defense counsel argued that since Melton was an informant, and an agent of the Commonwealth, it could obtain a release form her and obtain the records. The trial court overruled the motion based on the fact that the Commonwealth did not have any records.

Melton was hospitalized for days after the date of her ex-husband's death. Melton testified by avowal that she suffered from amnesia since a year she could not remember. She said that there was still a lot that she could not remember about her past as a child and "stuff like that." She had total amnesia and could not remember her "family or nothing." At the close of the evidence adduced at trial, a motion was made to strike Melton's testimony. The motion was overruled. A motion for an admonition regarding Melton's avowal testimony that the suffered from amnesia was overruled. The issue was again addressed in the motion for new trial.

Cynthia Moore's Mental Condition

Prior to Moore's testimony, counsel renewed the motions to bar her testimony based on incompetency and the motions for the psychiatric, psychological reports which had been done on her. The motion was overruled as to the incompetency issue, and since the

Commonwealth had no psychiatric or psychological reports, there were none provided. Moore admitted during her testimony that she wanted to try to "quit doing drugs." She further admitted that she had taken medicine for seizures - Dilantin - ever since she was a child. She was under the doctor's care of Dr. Erwin Blose and Dr. Garcia. When she went to Texas, prior to June of 1990, she had seizures and had to be hospitalized. She had tried to shoot herself in June of 1990, and had to be hospitalized. She had several seizures then, and was strung out on drugs. She was given some form of medication at that time. She got depressed and tried to commit suicide. In January of 1989, Moore was in a hospital in Florence, Kentucky. Moore applied for Social Security Disability Benefits when she was with Eldred on the basis of epilepsy, severe depression and being an ex-addict.

The Supreme Court of Kentucky noted in its opinion as follows:

> There does not appear to be any real dispute that Appellant [Respondent] is entitled to discover medical or psychiatric records concerning a witness if certain prerequisites are met. The fight is over what showing is required to gain such access. An important subsidiary question concerns how far the Commonwealth must go in furnishing such records, particularly where it does not have immediate, physical possession of them. Eldred v. Commonwealth, Ky., 906 S.W.2d 694, 700 (1995).

In footnote 4 to the opinion, there is discussion of the various possible sources for the right to obtain the mental health records, the Sixth or Fourteenth Amendments of the U.S.

Constitution which provide the rights to compulsory attendance of witnesses; the state counterpart in Section 11 of the Kentucky Constitution; the right to cross-examination under the confrontation clause of the Sixth and Fourteenth Amendments to the U.S Constitution, and Section Eleven of the Kentucky Constitution, and the Due Process Clause of the U.S. Constitution in the Fourteenth Amendment and the state counterpart, Section 2 of the Kentucky Constitution. Reliance on any of these authorities results in the acknowledgement that there is no absolute statutory privilege which prevents Eldred from securing the records in question.

In resolving the issue, the Kentucky Supreme Court noted that it was the Petitioner's argument that the conditions under which the prior mental treatment of a witness becomes relevant were not met in this case. Id. at 701.

The Kentucky Supreme Court found that the trial court abused its discretion in denying the discovery sought, thereby concluding that no absolute statutory privilege exists in Kentucky. Id. at 702. The Kentucky Supreme Court found that the:

> ...numerous problems that Moore had accumulate into articulable evidence that raises a reasonable inquiry about Moore's past medical and psychiatric history sufficient to support Appellant's discovery request. Therefore, reversal is required. Upon remand, the trial court should direct subpoenas appropriately, and conduct any in-camera review necessary.
>
> Regarding Melton, she made her mental state an issue by requesting

> psychiatric counseling. As such, Appellant has met his burden to support his discovery requests. Reversal follows, and the trial court should proceed accordingly upon remand.

Even if Melton's mental state was not such as to support discovery initially, upon the discovery of her "amnesia,' an adequate basis for discovery of her medical and psychiatric records was created.

The Kentucky Supreme Court discussed the question of whether the source of the right was the federal constitution or the state constitution in Footnote 4. Reference was made to Section 11 of the Kentucky Constitution as well as the Sixth and Fourteenth Amendments to the United States Constitution. Additionally a state case was cited, Turner v. Commonwealth, Ky., 767 S.W.2d 557, 559 (1988), and the Kentucky Supreme Court noted that the opinion in that case was silent as to whether it was based on the state or the federal constitution.

The petitioner filed a Petition for Rehearing in the Kentucky Supreme Court on November 16, 1994, where, for the first time it raised the claim that respondent was not entitled to the mental health records based on petitioner's assertion that there exists in Kentucky an absolute statutory privilege which prevents discovery of patient and psychiatrist communications.

The Kentucky Supreme Court denied the Petition for Rehearing.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE KENTUCKY SUPREME COURT BECAUSE THE COMMONWEALTH'S PETITION FOR WRIT OF CERTIORARI FAILED TO COMPLY WITH THE REQUIREMENTS OF SUPREME COURT RULE 21(h).

The Commonwealth's petition for writ of certiorari asks this Court to review the judgment of the Kentucky Supreme Court in the case of Eldred v. Commonwealth, Ky., 906 S.W.2d 694 (1995). This Court lacks jurisdiction to review this state court judgment because the petitioner raised the issue for the first time in its Petition for Rehearing to the Kentucky Supreme Court and failed to cite to the record to show how there was timely preservation of the issue. The petitioner thereby failed to comply with the requirements of Supreme Court Rule 21(h).

Under Supreme Court Rule 21(h), the party seeking review in this Court of a state court judgment "shall" specify all stages of the proceedings at which the federal questions it seeks to be reviewed were raised, how they were raised, and how the state court ruled upon them, including specific references to the record to show "the federal question[s were] timely and properly raised."

In the Petitioner's Statement of the Case, the petitioner apparently attempted to comply with Supreme Court Rule 21(h), by noting that, "[o]n rehearing, the Commonwealth reminded the state high court that the Kentucky law created an absolute evidentiary privilege which protects against disclosure of confidential

communications uttered for the purpose of diagnosis or treatment of mental conditions."

However, the petitioner never cited to the record to show how the "the federal question was timely and properly raised."

Furthermore, the petitioner never claimed that the issue had been presented at the trial level (which it was not), nor did it claim that the issue was presented during the initial briefing of the issues (which it was not). The petitioner claims that it "reminded" the court of the Kentucky law regarding evidentiary privileges; yet, the petitioner failed to note any prior time when it presented such an argument. The reason for this is that it did not raise the issue until it filed its Petition for Rehearing. Thus, the petitioner's use of the word "reminded" is misleading and inaccurate.

Pursuant to RCr 9.22. "... for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court, and on request of the court, his grounds therefor..." Accordingly, the Commonwealth was required under state law to present its argument at the trial court when the issue was first raised by the motion for discovery of the mental records of the informant, and during the times that the issue was raised again during trial. See Fair v. Commonwealth, Ky., 652 S.W.2d 864 (1983).

Not only did the Commonwealth fail to present the issue which is the subject of the certiorari petition at the trial stage, but, actually waived this issue. It must be remembered that the Commonwealth at trial did not oppose the request for discovery. Furthermore, in its Brief for Appellee, the Commonwealth actually accepted the legal proposition that there are circumstances where the prior mental treatment of a witness is relevant and can be admitted during a trial. Specifically on page 14 of the Brief for Appellee, the following argument is advanced by the Commonwealth:

> The prior mental treatment of a witness is not relevant as to the credibility of a witness unless it can be demonstrated that there was a mental deficiency at the time the testimony or at the time of the matter about which the testimony was given, Commonwealth v. Huber, Ky., 711 S.W.2d 490 (1986). (Emphasis Added).

The Commonwealth proceeded in its Brief for Appellee to present factual distinctions which it argued made the past mental health records of the two witnesses irrelevant. Brief for Appellee at 14-15. The Commonwealth never presented the argument in its Brief for Appellee that an absolute statutory privilege prevented the discovery or admission of the mental health records of the two witnesses! Even though the Commonwealth's "absolute" position had been waived, Kennedy v. Commonwealth, Ky., 544 S.W.2d 219 (1976), the Commonwealth advanced, for the first time, the argument presented to this Court in its certiorari petition in its Petition for Rehearing to the Kentucky Supreme Court. Because the position advanced by the petitioner was meritless, the Kentucky Supreme

Court denied the Petition for Rehearing.

The Supreme Court of Kentucky has rejected issues presented for the first time in a petition for hearing. Reed v. Reed, Ky.App., 457 S.W.2d 4 (1969), cert. denied, 410 U.S. 931, 93 S.Ct. 1375, 35 L.Ed.2d 594 (1973). This Court has found that, "[A] state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." Williams v. Georgia, 349 U.S. 375, 382-383 (1955).

This Court has found that the assertion in a state court in a petition for rehearing affords no ground for invoking the appellate jurisdiction of the Federal Supreme Court unless the state court in dealing with the petition considered and passed upon the Federal ground relied upon. Rowe v. Scott, 233 U.S. 658, 34 S.Ct. 769 (1914); Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945).

Since the Commonwealth failed to properly preserve the issue as is required in Kentucky by a timely objection at the trial level, and since it did not continue to support the argument in its brief, and since it waited to untimely present the argument for the first time in its Petition for Rehearing, the Commonwealth failed to properly preserve this issue, and this Court does not have jurisdiction to address the issue.

Since the Commonwealth failed to comply with Supreme Court Rule 21(h), this Court has no jurisdiction to grant the petition.

II.

THE QUESTION PRESENTED BY THE PETITIONER CONTAINS A GROSS MISREPRESENTATION OF KENTUCKY LAW; FURTHERMORE, THERE IS NO FEDERAL ISSUE FOR THIS COURT TO REVIEW SINCE THE KENTUCKY SUPREME COURT DECIDED CORRECTLY UNDER BOTH STATE AND FEDERAL LAW THAT ELDRED HAS THE RIGHT TO SECURE THE MEDICAL/MENTAL RECORDS OF THE TWO KEY ACCUSATORY WITNESSES AGAINST HIM SO THAT HE CAN EFFECTIVELY CONFRONT THEIR TESTIMONY TO RECEIVE A FAIR TRIAL.

A. Misrepresentation of State Law.

This Court should not grant review because the question presented by the petitioner contains a misrepresentation of Kentucky law. Petitioner claims that in Kentucky there is "an absolute statutory privilege" which protects communications between psychiatrists and patients. Petition, p. 10.

A view of the statute, KRS 421.215, reveals that within the statutory provision itself, there are several exceptions to the privilege. KRS 421.215(2) and (3). The confidential information revealed by a patient to a psychiatrist can be revealed to others in order to commit the patient to a hospital for mental illness. The information can be revealed in court pursuant to a court ordered examination when an issue involving the patient's mental condition exists and the patient has been told the communications would not be privileged. Finally, in civil proceedings where the patient introduces his mental condition as an element of his claim or defense, the judge can pierce the privilege. Clearly, under Kentucky law, there are numerous avenues which allow confidential

communications to be revealed to others.

Not only are there exceptions built into the statute itself, but pursuant to the case cited by the petitioner for the proposition that the statutory privilege is absolute, Matthews v. Commonwealth, Ky., 709 S.W.2d 414, 419 (1985), there is yet another exception, which is that the patient can waive the privilege in a criminal proceeding when he is the defendant.

Petitioner's entire argument is based on the false premise that Kentucky has an "absolute statutory privilege" regarding psychiatrist/patient communications, and that this fact distinguishes Eldred's situation from the one in Pennsylvania v. Ritchie, 480 U.S. 39 (1987). Petitioner claims that Eldred fits into the category of cases where the state statute prevents release of confidential communications between psychiatrists/patients to anyone. Petitioner thus asks this Court to address the "unanswered" question in Ritchie at footnote 14. That question is whether or not the outcome would be different if a state statute protected the juvenile files from disclosure to anyone, including law-enforcement and judicial personnel. However, since Kentucky's statute does not protect disclosure from law-enforcement and judicial personnel in Kentucky, as the Kentucky Supreme Court so found in Eldred, Eldred's situation does not afford this Court the opportunity to answer the unanswered question.

B. There is no federal question for this Court to review since the state court correctly decided the issue under both state and federal law.

The actual issue in this case is whether the respondent has the right to obtain the medical/mental health records of the two key accusatory witnesses against him in order to effectively confront their testimony and secure a fair trial. This Court's ruling in Davis v. Alaska, 94 S.Ct. 1105, 1112-13 (1974) is controlling and requires the finding that respondent does have the right. Respondent's situation is further governed by this Court's ruling in Ritchie which also results in the conclusion that respondent has the right. There is no need for this Court to review this case, as the Kentucky Supreme Court has appropriately relied upon this Court's decisions in Davis, and Ritchie, in addition to relying on the state case Turner v. Commonwealth, Ky., 767 S.W.2d 557, 559 (1988), and the state constitutional grounds to find that respondent was entitled to have the trial court order the medical/mental health records of the two key accusatory witnesses to be presented to the court for review to determine if the records contain information which would impact on the credibility of the witnesses, and therefore be relevant to respondent's defense for impeachment purposes. The Kentucky Supreme Court decision is not in conflict with any decisions from this Court.

This Court should deny review, as there is no federal issue to be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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NO._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

_____

COMMONWEALTH OF KENTUCKY, PETITIONER,

V.

FRANK ELDRED, RESPONDENT.

_____

APPENDIX

_____

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Frank ELDRED, Appellant,

v.

COMMONWEALTH of Kentucky, Appellee.

No. 91-SC-678-MR.

Supreme Court of Kentucky.

Oct. 27, 1994.

As Modified on Denial of Rehearing Sept. 21, 1995.

Defendant was convicted in the Circuit Court, Russell County, Philip R. Morgan, J., of murder and arson. Defendant appealed. On denial of rehearing, the Supreme Court, Stumbo, J., held that: (1) trial court abused its discretion in denying defendant's motion for 60-day continuance; (2) defendant was entitled to discovery of mental health and medical records of witnesses as exculpatory evidence bearing on credibility; (3) witness' testimony that defendant informed witness in which county witness could get away with committing murder was inadmissible other crimes evidence; (4) totality of circumstances provided arresting officer with probable cause to make warrantless arrest of defendant; and (5) conviction of defendant for both arson and murder did not violate state constitutional proscription against double jeopardy.

Reversed and remanded.

Stumbo, J., concurred in part but dissented by separate opinion in part.

Wintersheimer, J., filed a separate dissenting opinion in which Fuqua, J., joined.

Lambert, J., concurred in part and dissented in part.

1. Criminal Law ⇐578, 586

Decision on whether to grant continuance is within sound discretion of trial court based upon unique facts and circumstances of case, including length of delay, whether there have been any previous continuances, inconvenience to litigants, witnesses, counsel, and court, whether delay is purposeful or caused by defendant, availability of competent counsel if at issue, complexity of case, whether denying continuance would lead to identifiable prejudice, and qualitative difference of capital case.

2. Criminal Law ⇐589(1), 590(2), 613

Trial court abused its discretion in denying defendant's motion for 60-day continuance of capital murder trial after state reached plea agreement under which victim's ex-wife agreed to testify against defendant, in light of minimal delay requested, fact that continuance was first one sought in case, lack of substantial inconvenience, fact that cause of delay was timing of plea agreement, complexity of case, and identifiable prejudice from defense counsel's inability to pursue further investigation.

3. Criminal Law ⇐700(2.1)

It is clear that Commonwealth must produce any evidence that is favorable to defendant and material to question of his guilt and punishment and, thus, disclosable information will not necessarily be withheld on ground that it is embarrassing to Commonwealth's witness.

4. Criminal Law ⇐700(6, 7)

Commonwealth's obligation to disclose exculpatory evidence includes records actually in hands of prosecutor, its investigator, and other state agencies.

5. Criminal Law ⇐627.6(6), 627.8(3)

Defendant does not have to establish relevance and materiality of medical records of state witnesses in order to raise reasonable inquiry of witness' mental health history for purposes of defendant's entitlement to discovery of records as exculpatory evidence.

6. Criminal Law ⇐627.8(1)

Trial court should subpoena medical and mental health records of state witness if necessary to satisfy defendant's request for discovery of records as exculpatory evidence.

7. Criminal Law ⇐627.8(4)

If physician-patient privilege or other privacy interest is raised in objection to defendant's request for discovery of exculpatory evidence of medical and mental health

records of state witness, then trial court shall conduct in camera hearing in presence of prosecutor and defense counsel to determine whether any requested information would be both relevant and material to witness' credibility.

8. **Criminal Law** ⇐1170½(5)

Denial of effective cross-examination is constitutional error of first magnitude and will not be cured by showing of want of prejudice. U.S.C.A. Const.Amend. 6.

9. **Criminal Law** ⇐627.6(6)

Defendant raised reasonable inquiry about mental health of state witnesses and, thus, trial court abused its discretion in denying defendant's request for discovery of mental health and medical records of witnesses as exculpatory evidence bearing on credibility; one witness had drug addiction, epilepsy, severe depression, and had attempted suicide, and other witness made issue of her mental health by requesting psychiatric counseling and by subsequently stating she suffered from amnesia.

10. **Criminal Law** ⇐338(7), 369.2(1)

Evidence of other uncharged crimes or bad acts is admissible only if probative of issue independent of character or criminal predisposition, and only if probative value of and need for evidence outweighs its unduly prejudicial effect.

11. **Criminal Law** ⇐369.2(1)

Traditional exceptions to general rule proscribing admission of evidence of other uncharged crimes or bad acts include evidence establishing motive, intent, guilty knowledge, identity, common plan or scheme, or absence of mistake or accident.

12. **Criminal Law** ⇐369.3

Witness' testimony that defendant informed witness in which county witness could get away with committing murder was inadmissible other crimes evidence relating to future acts and criminal character or predisposition.

13. **Criminal Law** ⇐517(7)

Witness' testimony that defendant informed witness in which county witness could get away with committing murder was inadmissible even assuming that defendant's statement was form of confession, in light of limited probative value of statement due to its prospective language, and limited need for evidence in light of other testimony by witness referring in less inflammatory manner to other instances of defendant confessing to charged murder.

14. **Criminal Law** ⇐369.3

Witness' testimony that she heard defendant talk about other murders in area was inadmissible other crimes evidence.

15. **Criminal Law** ⇐369.3

Evidence that defendant might have been biker, drug dealer, or pimp was not relevant in capital murder trial, and thus was inadmissible.

16. **Homicide** ⇐163(1)

Witnesses' testimony on their general fear of defendant was not relevant in capital murder trial, although testimony as to specific actual threats against witnesses by defendant could be relevant and admissible if threats related to charges at issue in case.

17. **Criminal Law** ⇐369.1, 1169.11

Whether testimony of state witnesses was unsolicited bears upon harmless error analysis but cannot justify admission of improper other crimes evidence.

18. **Criminal Law** ⇐1171.1(1), 1171.8(1)

Abuse of system from state witness' repeated unsolicited statements coupled with other areas of prosecutorial misconduct, may result in reversible error.

19. **Criminal Law** ⇐444

Detective supplied necessary foundation for photographs by testifying that photographs accurately depicted murder scene at time that victim's automobile was discovered.

20. **Criminal Law** ⇐438(7)

Relevant photographs generally are not rendered inadmissible merely from fact that they are gruesome and depict heinous crime.

21. **Criminal Law** ⇐438(4, 7)

Commonwealth could depict actual crime scene by using photographs showing interior

of victim's automobile after it was destroyed by alleged arson and indistinctly showing victim's remains, despite brutality of crime depicted; photographs were not so indecipherable as to lose all relevance.

22. **Criminal Law** ⇐438(2, 7)

Photograph of victim before murder was admissible to present victim as living person, rather than mere statistic, absent anything rendering photographs shocking, sensational, likely to provoke anger, or likely to induce undue sympathy or hostility.

23. **Arrest** ⇐63.4(1)

Police officer may make warrantless arrest if officer has reasonable grounds to believe felony has been committed by arrestee so that officer has probable cause to make arrest at time of arrest.

24. **Arrest** ⇐63.4(2)

Probable cause to make warrantless arrest exists if totality of evidence known to arresting officer at time, including reliability of informant and his or her basis of knowledge, creates fair probability that arrestee committee felony.

25. **Arrest** ⇐63.4(8, 15)

Totality of circumstances provided arresting officer with probable cause to make warrantless arrest of defendant for murder based primarily on statements of defendant's girlfriend that defendant had confessed to her, despite fact that some of details from informant were not corroborated and were contradicted by independent evidence in murder investigation, and despite problems with informant's reliability in light of her drug addiction and her medical and mental health problems.

26. **Criminal Law** ⇐351(10)

Witnesses ⇐405(1)

Impeachment by contradiction regarding collateral facts is prohibited, although evidence of intimidation of witness by defendant or by his or her agent, is admissible on issue of guilt.

27. **Criminal Law** ⇐359

Defendant has right to introduce evidence that another person committed offense with which defendant is charged.

28. **Homicide** ⇐178(1)

Evidence offered by defendant concerning intimidation of potential witness by boyfriend of victim's ex-wife was not collateral, but rather was admissible to show that ex-wife rather than defendant committed murder.

29. **Witnesses** ⇐344(5)

Evidence that witness had lied on insurance policy application about prior fires was sufficiently remote from issues in capital murder trial concerning arson of victim's automobile to render evidence inadmissible as collateral facts, absent any common plan or scheme between arson for profit and arson for murder, and in light of cumulative nature of evidence on issue of motive.

30. **Double Jeopardy** ⇐1

State constitutional prohibition on double jeopardy bars subsequent prosecution for offense after defendant is acquitted or convicted and also prohibits multiple punishment for same offense. Const. § 13.

31. **Double Jeopardy** ⇐150(1)

Arson charge was distinct from murder charge for double jeopardy purposes in light of separate elements of arson requiring proof of serious physical injury and proof of intent to damage or destroy victim's automobile not required for murder, and separate element of murder charge requiring proof of victim's death not required on arson charge. Const. § 13.

32. **Double Jeopardy** ⇐150(1)

Conviction of defendant for both arson and murder arising from single act of burning automobile with victim inside did not violate state constitutional proscription against double jeopardy; defendant's single criminal act of burning automobile had compound consequences of killing occupant and destroying car. Const. § 13.

33. Criminal Law ⇐1171.1(6)

Prosecutor's closing argument quotation from book of Bible was more literary reference than suggestion that Bible or God required conviction and, thus, argument did not result in reversible error.

34. Criminal Law ⇐723(1), 1171.1(6)

Prosecutor's attempts in closing argument to illicit sympathy of jury appeared calculated to come as close as possible to previously condemned arguments, but argument did not rise to level of reversible error considering leeway prosecutor had in arguing his case.

35. Homicide ⇐358(1)

Evidence on aggravating factor of "murder for hire" presented issue for jury in capital murder trial; although defendant claimed testimony of his girlfriend was completely unreliable, victim's ex-wife also testified that she hired defendant to murder victim.

36. Criminal Law ⇐1171.1(1)

Improper gestures and expressions of disbelief by one of Commonwealth's attorneys during defendant's closing argument did not rise to level of reversible error.

Marie Allison, Assistant Public Advocate, Department of Public Advocacy, Frankfort, for appellant.

Chris Gorman, Attorney General, David A. Sexton, Assistant Attorney General, Criminal Appellate Division, Frankfort, Robert L. Bertram, Commonwealth Attorney, Jamestown, for appellee.

STUMBO, Justice.

This appeal arises from the judgment of conviction of Appellant, Frank Eldred, for murder, for which he received a sentence of imprisonment for life without the possibility of parole for twenty-five years. He appeals to this Court as a matter of right.

On July 23, 1988, Herbert Cannon was killed when his automobile was burned. The automobile was completely destroyed by the extremely hot fire, which also incinerated the body, although the official cause of death was smoke inhalation and carbon monoxide intoxication. The Commonwealth's theory of the case was that the decedent was killed by Appellant and a confederate, Tommy Perdue, at the request of Cannon's ex-wife, Sue Melton, for the sum of $5,000.

The Commonwealth's case was premised initially upon the testimony of Appellant's girlfriend, Cynthia Moore. She came forward in August 1990 and accused Appellant of the murder based upon statements he had made to her during the course of their relationship. There was additional evidence derived from the investigation of the crime, although it apparently was insufficient to make a case since no indictment was sought until after Moore came forward.

In any event, Appellant was arrested on November 15, 1990. An indictment was filed the next day charging Appellant, Melton, and Perdue, each with murder as a principal, complicity to murder, first degree arson as a principal, and complicity to first degree arson. Since it was asserted that the murder was "for hire," and proper notice having been timely filed, the death penalty was a potential sentence. *See* KRS 532.025(2)(a)(4).

On December 7, 1990, a trial was scheduled to begin on June 10, 1991. Eventually, the trials of the three co-defendants were severed, and Appellant's was slated to go first. A pre-trial conference was held on Friday, May 31, 1991, at which time it appeared that the trial of Appellant would proceed, and further that neither of the other two co-defendant's would enter any plea agreement. Thereafter, on Wednesday, June 5, 1991, counsel and the trial court held a conference call concerning the status of the case. During the call, there was no mention of any potential plea agreements. At a subsequent hearing on various motions, including one to exclude all out-of-court statements by the co-defendants, on Friday, June 7, 1990, it was first revealed that the Commonwealth might reach an agreement with Melton, which would include her testifying for the Commonwealth at Appellant's trial. Although there was no motion by Appellant for a continuance at that time, the trial court raised the "specter" of a continuance based

upon the serious impact such an agreement would have on Appellant's defense.[1]

In fact, a plea agreement was reached late on Friday, June 7. The essence of the agreement was that the charges against Melton would be amended to conspiracy to commit first-degree assault and conspiracy to commit kidnapping, which are both punishable as "Class C" felonies. The penalty recommended by the Commonwealth would be ten years on each offense to be served consecutively. She and her family were also to receive adequate protection from the police. In exchange, she agreed to truthfully testify at Appellant's trial. Her sentencing was to be postponed for sixty days in order to allow for the trial of Appellant to be concluded.

The existence of the plea agreement was revealed on the morning of Monday, June 10, 1991, which had been scheduled to be the first day of trial. However, the Commonwealth was not initially prepared to disclose the substance of the plea agreement, the statement made by Melton in reaching the plea agreement, nor apparently any of the previous statements made by her. As a result, Appellant indicated he was not ready for trial, and a continuance was requested. The need for the continuance was based upon the failure to reveal the agreement and any of Melton's statements, as well as the need for additional investigation. Specifically, Appellant's counsel stated that he would now need to interview additional witnesses, whom he had not previously needed to consider in light of the severance of the trial of the co-defendants, and the anticipated order preventing any statements from them being introduced; carefully consider the insurance policy issued on the life of the decedent, which might have been a motive for Melton to kill, as had been suggested by one of the investigating detectives; and follow up on any new leads revealed in this new information, and information which was to be disclosed concerning payments made by the police to, or on behalf, of Moore. In view of the sudden and dramatic change in circumstances, the need for new investigation, and because the Appellant was on trial for a capital offense, a continuance for sixty days was requested. The Commonwealth took the position that no continuance was necessary because it would take a week to seat the jury, which would allow for any needed investigation. The decision on the motion was postponed until the afternoon when Melton's counsel would be available.

At 1:00 p.m., Melton's counsel disclosed the substance of the plea agreement, which was outlined above. The Commonwealth disclosed that there was no record of the statement made during the plea agreement by Melton either by the Commonwealth Attorney or by the investigating detective. Again, the Commonwealth was not prepared to release any statements made by Melton and proposed releasing them only on the morning of trial. After discussion between counsel and the trial court, which included a reiteration by Appellant's counsel of the grounds for continuance previously noted, as well as further explanation of the need for investigation based upon the vast difference between the statement Melton must have made during the plea agreement and her previous statements; the extensive file on Melton, who had been the subject of investigation, since the time of decedent's death; and the need to explore the psychiatric history of Melton, who had asked for a psychiatric examination shortly after her arrest. The trial court determined that a continuation of one week until Monday, June 17, 1991 was sufficient. It was further ordered that the Commonwealth would produce the statement made by Melton as a part of the plea agreement by noon on Wednesday, June 12, 1991, as well as any other statements made by Melton.

On Friday, June 14, 1991, Appellant renewed his motion for a continuance of sixty days. In support of the motion, counsel restated the previous grounds, and pointed out that new lines of investigation developed as a result of the disclosure of Melton's statements. Specifically, questions had been raised about previous fires in which Melton

1. The Commonwealth in its brief makes a pointed reference to this "failure," which seems overblown, at the least, since a motion for a continuance on June 7 would have been premature because there was no deal at that time.

had been involved and had collected insurance proceeds, which related to the allegation that Melton had killed to collect on decedent's life insurance policy, which would also provide a source of payment to Appellant and Perdue. Some investigation had been attempted on Thursday, June 13, 1991, which was the first day it could be attempted after delivery of Melton's statements on the afternoon of Wednesday, June 12, but was not completely successful, because one of the insurance agencies involved was closed. Additionally, there were statements made by Melton to neighbors; an attempt to intimidate one of the neighbors, Wanda Carter, by Melton's boyfriend, Chuck Connors; questions concerning the time and dates of Melton's employment at Lake Lure Lodge; and questions about Melton's alibi witness, all of which needed further investigation. Appellant's counsel pointed out that all the needed investigation had to be accomplished during the remainder of Friday, and over the weekend, since trial was scheduled for Monday, June 17. The Commonwealth took the position that under Appellant's theory one would never be ready to try the case since there would always be other lines of investigation. Apparently, the trial court was persuaded because the motion was overruled.

The case proceeded to trial on Monday, June 17. After final pre-trial motions were considered, voir dire was commenced. Voir dire was conducted through Wednesday, June 19, when it was completed. The Commonwealth presented its case on June 19; Thursday, June 20; Monday, June 24; and concluded on Tuesday, June 25, at which time Appellant presented his case. Instructions were argued on Wednesday, June 26. The guilt phase was concluded with instructions and closing arguments on Thursday, June 27, as was the penalty phase. Appellant was found guilty of murder and first-degree arson, and was sentenced to life without the possibility of parole for twenty-five years and life, respectively. Any additional facts necessary to our analysis will be set forth in the context of our discussion of the issues.

[1] The first issue presented is whether the trial court abused its discretion in not granting Appellant's motion for a continuance of sixty days. A continuance will be granted upon a showing of sufficient cause. RCr 9.04; *Snodgrass v. Commonwealth*, Ky., 814 S.W.2d 579, 581 (1991). The decision as to whether to grant a continuance is within the sound discretion of the trial court based upon the unique facts and circumstances of the case. *Snodgrass*, 814 S.W.2d at 581. Factors that should be considered by the trial court include:

(1) The length of delay;

(2) Whether there have been any previous continuances;

(3) The inconvenience to the litigants, witnesses, counsel, and the court;

(4) Whether the delay is purposeful or caused by the accused;

(5) The availability of competent counsel, if at issue;

(6) The complexity of the case; and

(7) Whether denying the continuance would lead to any identifiable prejudice.

Id. We also note that Appellant's case was a capital case, with the death penalty possible, which makes the case qualitatively different. *See Smith v. Commonwealth*, Ky., 845 S.W.2d 534 (1993).

[2] As an initial note, there can be no dispute but that the plea agreement reached with Melton was a surprise, and had a sudden and dramatic impact upon Appellant's defense. With that factor in mind, we will consider individually the factors noted in *Snodgrass*. The length of delay in this case was only sixty days, which is rather minimal, particularly in a death penalty case. Thus, the delay factor should not have seriously impacted the continuance decision.

Second, the continuance was the *first* sought by anyone, which distinguishes the result in *Snodgrass*, as well as most other death penalty cases, where numerous continuances are the rule rather than the exception. Nor are we persuaded by the Commonwealth's parade of horribles concerning the neverending need for further investigation since this was the first continuance sought, and any such problem can be properly considered when, and if, additional continuances are sought. Consequently, the previ-

ous-continuances factor should not have come into play in the decision on Appellant's motion for continuance.

The third factor is the inconvenience caused by the continuance. Of course, any change in trial date is going to cause some inconvenience. Thus, in order to become a factor for consideration there must be some significant or substantial inconvenience, which should be demonstrated on the record. We note that in this case a continuance was granted, albeit only one week, which strongly suggests that the trial court was willing to put everyone to some inconvenience. As a result, it is difficult to see how a slightly longer period would have any significantly greater impact. While the reissuance of subpoenas could be an inconvenience, we note that the trial court has the power to put witnesses on recognizance to return on the newly scheduled trial date. In light of all the above, we must conclude that the inconvenience factor does not weigh seriously against granting Appellant's motion for continuance in this instance.

There is no evidence in the record that the delay sought by Appellant was caused by him, or made for the purpose of delay in and of itself. In fact, the cause of the delay was the timing of the plea agreement with Melton. While it is not appropriate on this record to "blame" the Commonwealth, since there is no evidence as to why the deal with Melton was not made at an earlier time, it is fair to note that the Commonwealth is the one with the most control over such situations, and if it delays making a deal until the eve of trial, it runs the substantial risk that a continuance will be granted. Therefore, the cause of the delay factor cannot be held against Appellant, and may weigh in his favor.

The fifth factor[2] concerns the complexity of the case. This case was a death penalty case, which factor alone makes it more complex. Additionally, the charges were initially based upon the statements made by an informant, with numerous potential reliability problems, based upon statements allegedly made to her by Appellant and Perdue. Thus, numerous, and often difficult, hearsay and confrontation questions are presented. The complications are heightened, rather than lessened, by the last-minute introduction of a confessing co-defendant. As a result, the complexity factor should have weighed in favor of the continuance.

Finally, the last factor is whether there is identifiable prejudice caused by the denial of the motion. In this instance, there is no question that Appellant's investigation was cut short. As we will note more fully later in the opinion, the avenues of investigation being pursued yielded relevant evidence, and might well have yielded additional, but as yet, undiscovered evidence if a full investigation had been possible. As such, there was clearly identifiable prejudice. It is no answer, as the Commonwealth attempts, to say that Appellant's counsel skillfully used the short time he had, and presented the best defense he could, since the question cannot be limited to what the defense is able to do despite the denial of its continuance motion, but whether legitimate, substantial avenues of investigation were prematurely cut off. In short, as Appellant argues in his brief, a defendant cannot be made subject to the "Catch 22" argument that he got enough investigation in the time available to obviate the need for a continuance, since such an argument begs the question of whether a continuance was actually appropriate. In sum, there was identifiable prejudice which is not eliminated by the skill of Appellant's trial counsel.

Based upon our analysis of the relevant factors from *Snodgrass*, we conclude that the trial court abused its discretion in denying the motion for a sixty-day continuance. We particularly note the complexity of the case, the prejudice identified, and that the other factors should have had little, if any, impact on the continuance decision. As a result, we must reverse the conviction of Appellant and remand for a new trial after an appropriate period is allowed for further investigation by Appellant.

2. There is no issue in this case concerning Appellant's counsel, or any potential substitute counsel, as would arise if there was an attempt to withdraw by counsel on the eve of trial as a result of a breakdown of communications between counsel and client.

Appellant's second argument concerns his right to discover the medical and psychiatric records of Melton and Moore. This is an area where legitimate, substantial avenues of investigation were prematurely cut off. At issue regarding Melton are records that may have been generated as a result of her request for psychotherapy shortly after her arrest in 1990, as well as other similar medical records, which would include her treatment from a Dr. Blose for emotional problems and "probably" depression. Additionally, her testimony disclosed that she was hospitalized for reasons unknown immediately after decedent's murder. Finally, she testified on avowal that she suffered from total amnesia from some time in the past, but could not remember the exact date. Moore's problems included admitted drug addiction, which along with her epilepsy and severe depression formed the basis for a social security disability claim. The epilepsy had been treated since her childhood with Dilantin. Apparently, she was under the care of a Dr. Bloce[3] and a Dr. Garcia in reference to seizures resulting from her epilepsy. She had been hospitalized in Florence, Kentucky, in January 1989, and in Texas in June 1990. The Texas hospitalization also seems to be related to her seizures. She had attempted suicide in June 1990.

There does not appear to be any real dispute that Appellant is entitled to discover medical or psychiatric records concerning a witness if certain prerequisites are met. The fight is over what showing is required to gain such access. An important subsidiary question concerns how far the Commonwealth must go in furnishing such records, particularly where it does not have immediate, physical possession of them.

The Commonwealth relies primarily upon *Commonwealth v. Huber*, Ky., 711 S.W.2d 490 (1986), for its argument on the merits that there was no error in denying Appellant's discovery requests. It holds that the prior mental treatment of a witness is relevant regarding the witness's credibility only where it can be shown that the witness suffered from a "mental deficiency," either at the time testimony was given or at the time at which the matter testified about occurred, and if the psychiatric problems relate to credibility. *Id.* at 491.

However, that holding is not as broad as the Commonwealth suggests. *Huber* involved a question of whether a trial court had abused its discretion by restricting a defendant's cross-examination at trial of the prosecution's key witness when the defendant had no substantial basis for the questions sought to be asked. In this case, the issue is actually one preliminary to that in *Huber*. Thus, *Huber* is not controlling.

[3] It is clear that the government must produce evidence that is favorable to the accused and material to the question of his guilt and punishment. *Pennsylvania v. Ritchie*, 480 U.S. 39, 55–56, 107 S.Ct. 989, 1000, 94 L.Ed.2d 40, 57 (1987). Information that is thus disclosable will not necessarily be withheld because it is embarrassing to a witness for the prosecution. *Id.*, 480 U.S. at 58–59, 107 S.Ct. at 1001–02, 94 L.Ed.2d at 58; *Davis v. Alaska*, 415 U.S. 308, 320–21, 94 S.Ct. 1105, 1112–13, 39 L.Ed.2d 347, 356 (1974); *see also Turner v. Commonwealth*, Ky., 767 S.W.2d 557, 559 (1988), which held that the complaining witness can be compelled to submit to a medical examination where the critical nature of the evidence sought by the defendant outweighs the potential for harm caused by the resulting invasion of the victim's privacy, and the probability that the examination sought was intended to harass the witness.[4] Information regard-

3. It is not clear from the record whether Drs. Bloce and Blose are one in the same person, or different physicians.

4. The source of this right is subject to some debate. It has been argued that a defendant's right to compulsory process to secure his witnesses for trial is broad enough to impact upon the government's obligation to provide discovery, although the question has been deliberately avoided. *See* Sixth and Fourteenth Amendments of the U.S. Constitution; Kentucky Constitution § 11; *Ritchie*, 480 U.S. at 55–57, 107 S.Ct. at 1000–01, 94 L.Ed.2d at 56–57.

It has also been debated as to whether the right to cross-examination, included within the confrontation clause of the Sixth and Fourteenth Amendments and § 11, has an impact on questions of discovery. *See Ritchie*, 480 U.S. at 52–53, 107 S.Ct. at 998–99, 94 L.Ed.2d at 54 (Powell, J., writing for the Court, but with only Rehn-

ing the credibility of a prosecution witness has been recognized as the sort of exculpatory evidence which is subject to disclosure. *Ritchie*, 480 U.S. at 56–57, 107 S.Ct. at 1000–01, 94 L.Ed.2d at 57 *et seq.*; *Rolli v. Commonwealth*, Ky.App., 678 S.W.2d 800, 802 (1984).

[4] Before proceeding to analyze the specific procedure for such discovery, we must address the subsidiary question of the Commonwealth's obligation when the records sought are not in its immediate, physical control. The Commonwealth's obligation includes records actually in the hands of the prosecutor, its investigator, and other agencies of the state. *Ritchie*, 480 U.S. at 58–59, 107 S.Ct. at 1001–02, 94 L.Ed.2d at 58; and *Ballard v. Commonwealth*, Ky., 743 S.W.2d 21, 22–23 (1988), which reversed a conviction after the Department for Human Resources withheld exculpatory evidence ordered to be produced, of which the Commonwealth's investigator was aware, although the Commonwealth's Attorney was not.

[5–8] The Appellant's argument requires us to take the analysis as to both what is discoverable, and the Commonwealth's obligation to produce it one step further. Specifically, Appellant seeks access to the medical records of witnesses which may not be in the hands of any government agent.[5] On this issue, we look to *Illinois v. Dace*, 114 Ill.App.3d 908, 70 Ill.Dec. 684, 449 N.E.2d 1031 (1983) for guidance.[6] There, it was held if a trial court is "[confronted] with articulable evidence that raises a reasonable inquiry of a witness's mental health history, [the] court should permit a defendant to discover that history." *Id.* 70 Ill.Dec. at 688, 449 N.E.2d at 1035. Moreover, the articulable evidence required of the defendant does not have to establish the relevance and materiality of the records sought, which would be impossible without access to the records. *Id.* If necessary, the trial court should subpoena the records sought. *Id.* 70 Ill.Dec. at 687, 449 N.E.2d at 1034. However, the defendant is not entitled to unlimited access or use of the evidence sought. Instead, where the doctor or the patient raises the physician-patient privilege, or some other similar privacy interest is raised, an in-camera hearing shall be conducted by the trial court in the presence of the prosecutor and defense counsel to determine which information would be both relevant and material to the witness's credibility. *Id.* 70 Ill.Dec. at 688, 449 N.E.2d at 1035; *see also Davis*, 415 U.S. at 320–21, 94 S.Ct. at 1112–13, 39 L.Ed.2d at 356; *Ritchie*, 480 U.S. at 58–59, 107 S.Ct. at 1001–02, 94 L.Ed.2d at 58. A denial of effective cross-examination is a constitutional error of the first magnitude, and no showing of want of prejudice will cure it. *Davis*, 415 U.S. at 318–19, 94 S.Ct. at 1111–12, 39 L.Ed.2d at 355.

[9] As to the specifics of this case, we conclude that the trial court abused its discretion in denying the discovery sought. When considered together, the numerous problems that Moore had accumulate into articulable evidence that raises a reasonable inquiry about Moore's past medical and psychiatric history sufficient to support Appellant's discovery request. Therefore, reversal is required. Upon remand, the trial court should direct subpoenas appropriately, and conduct any in-camera review necessary.

Regarding Melton, she made her mental state an issue by requesting psychiatric coun-

quist, C.J., and O'Connor and White, JJ., concurring), in which the answer was no; *Ritchie*, 480 U.S. at 61–64, 107 S.Ct. at 1003–05, 94 L.Ed.2d at 60–61 (Blackmun, J., concurring in part, and judgment, but writing separately on the issue), in which the answer was yes; and *Ritchie*, 480 U.S. at 65–67, 107 S.Ct. at 1005–07, 94 L.Ed.2d at 63 *et seq.* (Brennan, J., dissenting, joined by Marshall, J.), in which the answer was also yes.

The actual constitutional source relied upon in the opinion for the Court in *Ritchie* was the due process clause of the Fourteenth Amendment to the U.S. Constitution. *See Turner*, 767 S.W.2d at 559, which was also decided on the basis of due process, although there was no delineation of whether the decision was based upon federal or state law.

5. It is not clear on the record whether some of the medical records sought regarding Melton's examination after she was incarcerated are in the hands of some government agency. The other records appear to be in the hands of private physicians.

6. *Dace* is based upon both the Sixth Amendment's right of confrontation and the Fourteenth Amendment's due process component. *Dace*, 70 Ill.Dec. at 688, 449 N.E.2d at 1035.

seling. As such, Appellant has met his burden to support his discovery requests. Reversal follows, and the trial court should proceed accordingly upon remand.

Even if Melton's mental state was not such as to support discovery initially, upon the discovery of her "amnesia" an adequate basis for discovery of her medical and psychiatric records was created. *See Ritchie*, 480 U.S. at 59–60, 107 S.Ct. at 1002–03, 94 L.Ed.2d at 59, which noted that the duty to disclose is ongoing, and that material originally deemed immaterial may become material as proceedings progress, and a trial court would be obligated to order release of information that had become material.

Appellant also argues that the trial court should have held a competency hearing as to both Melton and Moore. *See* KRS 421.200, repealed Ky. Acts 1992, Ch. 324 § 33, *see* KRE 601. However, we need not decide the issue in view of our decision to reverse on other grounds, and remand for additional discovery. If upon remand sufficient additional evidence is adduced bearing upon the competency question, the trial court should reconsider the issue.

[10, 11] The third argument is that numerous instances of evidence of other bad acts were improperly used against Appellant. The question presented is whether the evidence should have been admitted in light of the general rule proscribing the admission of evidence of other, uncharged crimes or bad acts. *See Billings v. Commonwealth*, Ky., 843 S.W.2d 890, 892 (1992). Such evidence is admissible only if probative of an issue independent of character or criminal predisposition, and only where the probative value of, and need for, the evidence outweighs its unduly prejudicial effect. *Id.; Sanders v. Commonwealth*, Ky., 801 S.W.2d 665, 674 (1990). The traditional exceptions to the rule are where the evidence establishes motive, intent, guilty knowledge, identity, common plan or scheme, or absence of mistake or accident. *Billings*, 843 S.W.2d at 892. It has been said that the exceptions can be distilled down to the basic question of whether the evidence is relevant regarding one or more of the fundamental elements of a crime: *corpus delicti*, identity, or *mens rea*. *Id.*

[12, 13] The first, and most glaring, misuse of other crimes evidence occurred during the testimony of Moore. She was allowed, despite a pre-trial motion in *limine*, to testify "[Appellant] said because if you're going to commit murder do it in Russell County because you will get away with it." The statement is said to be an admission of guilt. However, the statement does not contain a confession per se. Only by reading between the lines could it be said to be any confession. Instead, the statement appears to be more prospective—"if you're going to"; therefore, more logically, it is a statement relating to future "acts" or intent. As a result, it is not relevant to the charges at issue, and it relates only to criminal character or predisposition, which precludes its admission. *Id.* Even if one were to assume the statement was a confession, when one considers the prejudicial impact against the probative worth of the statement, which is limited by its prospective language, and the need for the statement, which is limited given the other instances in Moore's testimony where she testified in a much less inflammatory manner to instances in which Appellant "confessed," the statement still must be excluded. *Id.* Consequently, we must conclude that the trial court abused its discretion in admitting the statement. Since we are reversing on other grounds, we need not expressly decide if this error alone would amount to reversible error, although we do note the significant prejudicial impact the admission of this statement has on Appellant's defense.

[14] A similar question was also subsequently asked of Moore by the Commonwealth. Although the issue is not preserved by contemporaneous objection, we will address it because it may arise on retrial. Specifically, the following exchange occurred between Moore and the Commonwealth's Attorney:

> Q. Cynthia Moore, look at the Jury and tell them if you knew about any other murders that might have occurred in this section of the state, during the time you lived with Frank Eldred?
>
> A. I have heard him talk about them, but I don't know any names, or anything like that, but yes.

Q. Were you acquainted with any other case, or any other murder down here besides the one you've testified about?

A. *No.*

This exchange is subject to the same analysis as the statement about committing murder in Russell County. The only reason it is addressed separately is because it shows a clear misunderstanding of the law concerning admission of other crimes evidence. The general rule is that such evidence is not admissible. *Only* where the evidence fits within one of the exceptions to the rule can it be considered for admission; it will be admitted only after a weighing process demonstrates the need for the evidence and the probative force of the evidence outweighs its admitted unduly prejudicial impact. This exchange does not even come close. Its admission was error.

[15] The next issues on this subject we will consider generically. On several occasions Appellant was referred to as a biker, a drug dealer, a pimp, and as having made threats against Melton or Moore. Some of these instances are not preserved, but we will address them since they may arise upon retrial. As a general principle, the fact Appellant may have been a biker, a drug dealer, or a pimp has no relevance to this case, and it is difficult to find an exception under which such references could be admitted. They do not show Appellant's motive, intent, or guilty knowledge. Nor does identity appear to be an issue, which is one ground the Commonwealth advances on appeal for the admission of the biker references; thus, the evidence is not admissible under this exception. Finally, they do not relate to common plan or scheme, or absence of mistake or accident. Consequently, this type of evidence would appear to not be proper. However, it is difficult to judge these questions in the abstract, and the trial court should consider any such evidence when the issue is presented consistent with this opinion.

[16] As for the evidence of "threats," including generic statements made by the witnesses of their fear of Appellant, it is subject to a similar analysis. However, testimony as to actual threats made, as opposed to the more non-specific "fear" testimony, which appears more related to Appellant's character, may be admissible if it relates to the charges at issue in this case.

[17, 18] Finally, we note that the Commonwealth on appeal relies upon the "unsolicited" nature of the statements on several occasions in defending their admission. The "unsolicited" factor only bears upon a harmless error analysis, and cannot in any way justify the admission of other crimes evidence. Moreover, when the "unsolicited" defense appears enough times, an inference may be raised that either the witness or the Commonwealth is out of control, and is trying to abuse the system. While such is not necessarily established on this record, instances of such abuse coupled with other areas of prosecutorial misconduct do raise the specter of reversible error, in and of themselves. *See Sanborn v. Commonwealth*, Ky., 754 S.W.2d 534 (1988).

[19–21] Complaint is also made as to the introduction of certain photographs. Specifically, Appellant asserts that two photos of the interior of the victim's car after it was destroyed by the fire, which also indistinctly show the remains of the decedent, were irrelevant and inflammatory, and a proper foundation was not laid. We first note that the detective specifically testified as to each of the photos that they truly and accurately depicted the scene when the automobile was discovered, which supplies the necessary foundation. As for the other questions, the general rule is that relevant pictures are not inadmissible just because they are gruesome and the crime they depict is heinous. *Clark v. Commonwealth*, Ky., 833 S.W.2d 793, 794–95 (1992). The Commonwealth is allowed to depict the actual crime scene, which is what the photos at issue do. *See Id.* While the photos are not the most distinct, they are not so indecipherable as to lose all relevance. Nor does the brutality of the crime they depict render them inadmissible. *Cf. Id.* Thus, there was no error in their admission.

[22] Appellant also argues that a photo of the decedent taken a few months before his death was prejudicial since it unduly engendered sympathy for him. There is no error in presenting evidence of a victim as a living

person, as opposed to a mere statistic, provided the evidence is not shocking, sensational, likely to provoke anger, or likely to induce undue sympathy or hostility. *McQueen v. Commonwealth*, Ky., 669 S.W.2d 519, 523 (1984). The photo in this case is a rather innocuous 8-by 11-inch portrait of the victim. It does not violate the rule from *McQueen*; therefore, there was no error in its admission.

[23, 24] The next error asserted concerns the admission of evidence seized and a statement made by Appellant during the course of his warrantless arrest on November 15, 1990. A police officer may make a warrantless arrest when the officer has reasonable grounds to believe a felony has been committed, and that the arrested individual committed the felony. *Crawford v. Commonwealth*, Ky., 824 S.W.2d 847, 849 (1992). In other words, was there probable cause to make the arrest, which must exist and be known to the officer at the time of the arrest. *See Clark v. Commonwealth*, Ky.App., 868 S.W.2d 101, 106 (1993). Probable cause cannot be found in retrospect. *Id.* Probable cause exists when the totality of the evidence, which includes the reliability of an informant and her basis of knowledge, then known to the arresting officer creates a fair probability that the arrested person committed the felony. *See Beemer v. Commonwealth*, Ky., 665 S.W.2d 912, 913-15 (1984); *Id.* at 106-07.

[25] In this case, the evidence available to the arresting officer was based primarily upon the statements of Moore concerning Appellant's "confession" to her. Additionally, there was some corroboration of some of the details of her statement from evidence independently developed during the course of the investigation. However, it is equally true that some of the details from Moore were not corroborated by the investigation, and some were contradicted by the investigation. Moreover, there are substantial problems with Moore's reliability, which were noted in reference to the second argument presented by Appellant. Nonetheless, we must conclude from the totality of the evidence that the arresting officer had reasonable grounds to arrest Appellant for the murder of decedent. Consequently, the evidence seized from, and the statements made by, Appellant were properly introduced.

Appellant's sixth assignment of error concerns the exclusion of certain evidence he desired to present to the jury. The first evidentiary ruling challenged concerns the admission of statements by a neighbor of Melton, Wanda Carter, that Melton's boyfriend, Chuck Connors, offered Carter money to leave the state. He also threatened her in an effort to deter her from testifying that Melton had come to Carter and asked if she knew of anyone who would kill the decedent. The statements from Carter, and a denial that they were made by Connors, as well as the relationship between Connors and Melton, were made by avowal. This is another avenue of investigation which yielded relevant evidence, but which may have been prematurely cut short.

[26-28] The basic issue is whether the evidence relates to a "collateral" matter. Impeachment by contradiction regarding collateral facts is prohibited. Lawson, *The Kentucky Evidence Law Handbook* (3d Ed.1993) § 4.10. However, the intimidation of a witness by a defendant, or by her agent in this case, is admissible on the issue of guilt. *Collier v. Commonwealth*, Ky., 339 S.W.2d 167, 168 (1960). Moreover, Appellant has the right to introduce evidence that another person committed the offense with which he is charged, which would include the intimidation of Carter by Connors since it is evidence of Melton's guilt in the murder of the decedent. *Kelly v. Commonwealth*, 259 Ky. 770, 773, 83 S.W.2d 489 (1935). As a result, the evidence offered concerning the intimidation of Carter was not collateral and should have been admitted. Since we are reversing on other grounds, we need not decide if this error alone would necessitate a reversal, although it is another example of the trial court's erroneous ruling denying Appellant the opportunity to present his defense. Upon retrial, if such evidence is offered it should be admitted.

[29] The second evidentiary ruling with which Appellant takes issue is the exclusion of evidence that Melton lied on certain insurance forms. Specifically, evidence was of-

fered by avowal that indicated that on an application for fire insurance for Melton's home that she had failed to advise the insurance company of other similar fire losses within three years of the application. As a result of that omission, her claim under the policy was initially denied, although ultimately she obtained a settlement. The evidence was said to be offered as impacting Melton's credibility since she had lied on the applications, as showing a pattern of conduct, and as reflecting on her motivation to kill the decedent.

The problem we have with this evidence is that it has wandered off into that nebulous realm of "collateral facts." *See* Lawson, § 4.10. While any lie by Melton does reflect on the likelihood she is telling the truth at trial, the "lies" on the insurance application are sufficiently remote from the real issues at trial to support the trial court's decision to exclude them. *Id.* Additionally, there is no true common plan or scheme between arson for profit and arson for murder under *Billings, supra.* Finally, as to motive, the evidence was at best cumulative, which would indicate its improper exclusion could not be reversible error. As a result, we conclude that the trial court did not err in excluding the evidence regarding Melton's insurance application.

The seventh error argued is that Appellant's conviction of both murder and arson is a violation of double jeopardy. Specifically, it is argued that the two charges arose from the same course of conduct, which precludes conviction on both charges. *See Grady v. Corbin,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990).

[30] The starting point for analysis of Appellant's double jeopardy claim must be *Ingram v. Commonwealth,* Ky., 801 S.W.2d 321 (1990).[7] The double jeopardy provision of Section Thirteen of the Kentucky Constitution provides that "[n]o person shall, for the same offense, be twice put in jeopardy of his life or limb...." It bars subsequent prosecution for an offense once a defendant is acquitted or convicted, and it also prohibits multiple punishment for the same offence. *Ingram,* 801 S.W.2d at 322.

The constitutional proscription against double jeopardy in Kentucky begins with consideration of the venerable precedent of *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The test derived therefrom is that where an act or transaction constitutes a violation of two distinct statutes, a defendant can be prosecuted for both if each statute requires proof of a fact the other does not.[8] *Ingram,* 801 S.W.2d at 322, quoting *Blockburger,* 284 U.S. at 304, 52 S.Ct. at 182. In other words, is one offense included within another. *Ingram,* 801 S.W.2d at 322.

The next step in the consideration of a double jeopardy challenge is the second prong enunciated in *Ingram.* It prohibits multiple prosecutions where the offense(s) arose from a single act or impulse with no compound consequences, even though "[b]y virtue of additional, circumstantial facts, the behavior was offensive to two criminal statutes." *Id.* at 324–25.[9]

[31] Under the *Blockburger* prong of *Ingram,* we readily conclude that there was no double jeopardy violation occasioned by the conviction of Appellant for murder and arson. The murder charge requires proof of dece-

7. We are, of course, aware of the statutory scheme in KRS 505.020 *et seq.*, which establishes a method of analyzing double jeopardy challenges for multiple offenses (KRS 505.020); former prosecutions for the same offense (KRS 505.030); former prosecutions for different offenses (KRS 505.040); and former prosecutions in other jurisdictions (KRS 505.050). However, in view of the plain language in *Ingram,* which held that "[t]his Court holds the Kentucky Constitution superordinate to legislative intent," *Ingram* is the proper source for double jeopardy analysis. *Ingram,* 801 S.W.2d at 323.

8. The provisions of KRS 505.020–.050 appear to be an attempt to codify *Blockburger. Ingram,* 801 S.W.2d at 322.

9. We note that the issue is not *Grady,* 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548, which was recently overruled in *United States v. Dixon,* 509 U.S. ——, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). Although this Court in *Ingram* quoted the "same conduct" test enunciated in *Grady,* it did not adopt it. *Ingram,* 801 S.W.2d at 323. Moreover, the "single act or impulse" test of *Ingram* would appear to be narrower than the same conduct test.

dent's death, which is not required in proving arson. On the other hand, arson requires only proof of serious physical injury. Additionally, the arson charge requires proof of intent to damage or destroy the automobile, which is not an issue in the murder charge. Thus, there are distinct elements in each of the offenses not required for the other, which precludes a finding of double jeopardy under the first prong of *Ingram*.

[32] Neither does the second prong in *Ingram* preclude appellant's conviction for both murder and arson. While double jeopardy principles prohibit multiple prosecutions for crimes which arise from only a single act or impulse, an exception is made when that act produces compound consequences. The results achieved by appellant's criminal conduct produced compound consequences arising from his single act of burning the automobile with the victim inside. Setting the car afire had the compound consequences of killing the occupant and destroying the car, the former being murder and the latter being arson. The conviction of appellant for both crimes was proper.

[33] The next argument concerns the Commonwealth's closing argument in the guilt phase. Although it will belabor an already overlong opinion, we will quote at length from the offending portions of the closing argument.

> Herbert Cannon has been dead for over 1,000 days and nights. The Defendant, and indeed you and I, and all of us in this courtroom, have had those days and nights. I'm sure Herbert would have liked to have had those days and nights. If, in the future, one should say a prayer, say one for Herbert. If, in the future, one should light a candle, light one for Herbert. If, in the future, someone should cry a tear, cry one for Herbert. I ask nothing for my ownself. I ask nothing for the State Police. I ask nothing in the name of persecution. I ask nothing that is wrong. But, not—I ask for everything in the name of what is right, and in the name of what is just. That's why we're here. We ask for everything in the name of truth. In the third chapter of Ecclesiastes it says, "There is a time for everything under the heavens, a time to be born, and a time to die." Surely God did not intend on the 23rd day of July, 1988, that Herbert Cannon dies. Surely the cold, callous words of the Defendant as to why the killing took place in Russell County, to the effect that you can get away with murder in Russell County, is not true. Say a thousand times if it takes it that you cannot get away with murder in Russell County. Return a verdict of guilty. Herbert Cannon cries from the grave for what is just and right. From his poor, dismantled, and burned body, he asks, through me, return a verdict of guilty.

Specifically, error is asserted concerning the prosecutor's quotation from Ecclesiastes, and then arguing that the decedent had been killed before God intended him to be. Appellant suggests that this argument is essentially the same as the argument that was condemned in *Ice v. Commonwealth*, Ky., 667 S.W.2d 671, 676 (1984). Disregarding the distinction that the argument in *Ice* was made during the penalty phase while the argument in this case was made in the guilt phase, which is a distinction without any real difference, the situation is distinguishable. In this instance, the argument was not made, as it was in *Ice*, that *The Bible* or God required a conviction. Instead the reference was more in the way of a literary reference. In that vein, we note for what it is worth that the same quotation could have been made from several other sources which quote *The Bible*, including Shakespeare, Dickens, the musical "Hair," and The Byrds' song "Turn, Turn, Turn," although perhaps not with the same persuasiveness. Thus, we find no reversible error. However, we do note the prejudicial impact under this argument of the erroneous admission of Appellant's Russell County comment analyzed above.

[34] Further attack is made upon the closing argument asserting that the prosecutor improperly attempted to elicit sympathy for the decedent. Although the question presented is not without its difficulties, considering the leeway a prosecutor is allowed in *arguing* his case, we cannot say the attempt to elicit sympathy rose to the level of revers-

ible error. *See Smith v. Commonwealth*, Ky., 734 S.W.2d 437, 448, 452 (1987).

However, we do think it appropriate to further note that prosecutors have "the responsibility to [prosecute] according to the principle that one accused of a crime is entitled to a fair and impartial trial." *Clark*, 833 S.W.2d at 797. That responsibility is abused when they make arguments that appear calculated to skate as close as possible to the edge of arguments previously condemned by this Court. Such gamesmanship does not do justice, and always flirts with a fall through thin ice into the icy waters of reversal for prosecutorial misconduct. Both portions of the argument at issue in this case appear to have been based upon such a calculation. However, in this instance we need only condemn the arguments and warn against repeated reliance upon them, or any similarly calculated argument.

[35] It is also argued that Appellant was entitled to a directed verdict on the issue of the aggravating factor of "murder for hire." It is said that the only evidence on the subject is the uncorroborated testimony of Moore, who is completely unreliable. The standard for a directed verdict is as follows:

> On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991). An appellate court reviewing the issue must determine whether it would have been clearly unreasonable for a jury to find a defendant guilty, and otherwise uphold the jury's verdict. *Id.* While there may be a case where a witness's testimony is so incredulous, self-contradictory, or otherwise unreliable that the testimony could not support a conviction, Moore's testimony is not so deficient. It was up to the jury to determine how "unreliable" her testimony was. We further note that Melton testified that she had hired Appellant to murder the decedent. Therefore, it was not clearly unreasonable for the jury to find Appellant guilty. As a result, there was no error in overruling Appellant's motion for a directed verdict.

[36] The last separate argument was raised by way of a supplemental brief. It is based upon the conduct of an Assistant Commonwealth's Attorney during Appellant's closing argument. Specifically, as stated by the trial court:

> I want to state for the record that at least 3 or 4 times during the Closing Argument of [Appellant's trial counsel] the attention of myself, the Court, was drawn to the table in which the Commonwealth Attorneys were seated by noise. And that noise was made by the Assistant Commonwealth Attorney.... Upon observing the Commonwealth table I personally observed [him] smiling, and making expressions of what I would interpret to be disbelief directed toward [his colleagues]. The importance of this is, the Jury in this courtroom in Russell County is seated in such a way so as to directly face the prosecutor's table. I didn't stop [Appellant's trial counsel's] closing statement, but I don't want that kind of thing to go on. It shouldn't have happened. The proceeding should not be affected by jestures [sic]. And it's common rules of courtesy to the Court, and opposing counsel, and to the Jury as well as the integrity of the proceedings, demand a higher level of conduct, and I don't appreciate it.

The following motion for a mistrial was overruled. We also note the offending party's childish "he did it too" comment. Although we find no reversible error, our comments following our discussion of the Commonwealth's closing argument are applicable here too. In fact, such conduct unremoved from the heat of closing argument is even more condemnable; it cannot be tolerated.

Appellant's cumulative error argument is rendered moot by our decision to reverse and remand.

For the reasons set forth above, we reverse the convictions of Appellant for murder and arson and remand for further proceedings consistent with this opinion.

STEPHENS, C.J., and LEIBSON, and REYNOLDS, JJ., concur.

STUMBO, J., concurs in part, but dissents by separate opinion in regard to the double jeopardy issue.

WINTERSHEIMER, J., dissents and files a separate opinion herewith, in which FUQUA, J., joins.

LAMBERT, J., concurs in the majority opinion's treatment of the double jeopardy issue, and dissents without separate opinion as to reversal of the conviction.

STUMBO, Justice, concurring in part and dissenting in part.

Respectfully, I must dissent from the majority's conclusion that the conviction of Appellant for both murder and arson was proper pursuant to the second prong in *Ingram v. Commonwealth*, Ky., 801 S.W.2d 321 (1990).

The second prong in *Ingram* yields a different result than expressed by the majority. In this case, the act of burning the car (i.e., arson) is part and parcel of the murder, which was the intended result. In other words, the arson was but the instrumentality to accomplish the murder. As such, it is the product of the same act or impulse. Nor is this a case where there are "compound consequences." Although the phrase "compound consequences" is laden with considerable ambiguity, the typical application would be where someone fired an automatic weapon into a crowd intending to kill only one person, but ended up killing several people. In that instance, the killer could properly be charged with multiple murders, even though they were the product of only "one act or impulse." By contrast, in this case the result of burning the car was to kill the decedent; there were no additional consequences or repercussions as a result of the burning of the car itself. Therefore, the conviction of Appellant for both murder and arson in this case was a violation of the proscription against double jeopardy in Section Thirteen of the Kentucky Constitution.

With all other issues, I concur.

WINTERSHEIMER, Justice, dissenting.

I respectfully dissent from the majority opinion because none of the alleged errors cited are of sufficient importance to require reversal.

Eldred failed to demonstrate that the trial judge abused his sound discretion when he refused to continue the trial for an additional sixty days. The trial judge did postpone the trial for one week to permit any additional investigation by defense counsel. Eldred has failed to show how the refusal of the trial judge to further delay the trial prejudiced the defendant's ability to defend himself against the charges. Whether a continuance is appropriate in a particular case depends upon the unique facts and circumstances of that case, and the decision to delay a trial rests solely within the sound discretion of the trial judge. RCr 9.04; *Snodgrass v. Commonwealth*, Ky., 814 S.W.2d 579 (1991). The detailed review of the decision of the trial judge in this regard made by the majority opinion does not convince me that there is any error such as would be condemned by *Snodgrass, supra*. A review of the record indicates that the trial judge exercised his discretion properly in determining whether to allow a delay and considered the length of the delay, previous continuances, inconvenience to litigants and the court, whether the delay is purposeful or caused by the accused, the complexity of the case and whether denying the continuance would lead to identifiable prejudice. There is no basis to reverse the conviction in this case.

The trial judge properly excluded evidence of the general mental condition of Moore and Melton because there was no demonstration by the defendant that any psychiatric problems could be related to their credibility. I do not believe that any avenue of investigation was prematurely terminated by the trial judge.

Commonwealth v. Huber, Ky., 711 S.W.2d 490 (1986), states in pertinent part as follows:

> The prior mental treatment of a witness is not relevant as to the credibility of that witness unless it can be demonstrated that there was a mental deficiency on the part of the witness, either at the time of the testimony or at the time of the matter being testified about. The mere fact that a particular witness has been treated for any kind of psychiatric problem in the past is of no significance in the impeachment of that witness unless it can be shown that the psychiatric problems relate in some way to the credibility of the witness.

The standard of *Huber, supra*, was not satisfied in regard to the general mental condition of either of the two witnesses. Thus the evidence was properly excluded. *Cf. Stanford v. Commonwealth*, Ky., 793 S.W.2d 112 (1990). The trial judge did not abuse his discretion in denying the discovery sought.

Eldred has failed to demonstrate that there was any improper introduction into evidence of prior bad acts or character evidence which would require a reversal. None of the complained of statements during the trial deprived Eldred of a fundamentally fair trial. The statements which are alleged as error are either unpreserved, were relevant for the jury to hear or were otherwise introduced into the proceedings as a result of the trial strategy of the defendant.

I agree with the majority that there is no double jeopardy in this case because murder and first-degree arson require proof of an element the other does not. However, the double jeopardy analysis in *Ingram v. Commonwealth*, Ky., 801 S.W.2d 321 (1990), is still fatally flawed because it relies on *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), which has been subsequently overruled in *United States v. Dixon*, 509 U.S. ——, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). This has been duly noted by the majority opinion. It is time to put *Ingram* to rest by overruling it. The same fate should fall to *Walden v. Commonwealth*, Ky., 805 S.W.2d 102 (1991). I believe Kentucky should return to the reasoning of *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) and the standard set out in *Wilson v. Commonwealth*, Ky., 695 S.W.2d 854 (1985) and *Polk v. Commonwealth*, Ky., 679 S.W.2d 231 (1984). See my dissent in *Ingram*.

I would affirm the conviction in all respects.

FUQUA, J., joins in this dissent.

NO. 95-1018

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

COMMONWEALTH OF KENTUCKY, PETITIONER,

V.

FRANK ELDRED, RESPONDENT.

CERTIFICATE OF SERVICE

I, Larry H. Marshall, a member of the Bar of this Court, hereby certify that on this 25th day of January, 1996, the attached Response to Petition for Writ of Certiorari, Motion For Leave to Proceed In Forma Pauperis, Affidavit of Indigency, and Appendix were mailed, first class postage prepaid, to Hon. A.B. Chandler, III, Attorney General of the Commonwealth of Kentucky, 1024 Capital Center Drive, P.O. Box 2000, Frankfort, Kentucky 40601, (502) 573-8300, counsel for the respondent. I further certify that all parties required to be served have been served.

Respectfully submitted,

Larry H. Marshall

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